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Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KATILA ANN JEAN NASH et al., Defendants and Appellants.	F066160 & F066278 (Super. Ct. Nos. BF131808A & BF131808C) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Madeline McDowell, under appointment by the Court of Appeal, for Defendant and Appellant Katila Ann Jean Nash.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant David Deshawn Moses.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendants Katila Ann Jean Nash and David Deshawn Moses guilty of first degree murder (Pen. Code,[1] §§ 187, subd. (a), 189) and found true the special circumstance that the murder was committed while defendants were engaged in the commission or attempted commission of burglary (§ 190.2, subd. (a)(17)(G)). At the time of the offense, Nash was 15 years old and Moses was 17 years old, and they were tried as adults. Nash was sentenced to 25 years to life in prison, and Moses was sentenced to life in prison without the possibility of parole (LWOP).[2]

This matter is presently before us for consideration for a third time. As set forth in our first opinion, before the joint trial on guilt, there was a jury trial on Nash's competence and she was found competent to stand trial. Nash was 17 years old at the time of her competency trial and she raises two claims on appeal regarding the competency determination; both claims are based on her age. First, she argues the adult criminal court should have complied with a California Rule of Court[3] that applies in juvenile proceedings in appointing an examiner to assess her competence. Second, she argues the jury instruction on competence was incorrect because it described the standard of competence applicable to adult criminal defendants. Nash asserts these alleged errors in her competency trial resulted in a denial of due process.

With respect to the trial on guilt, Nash contends (1) the trial court erred by admitting her statements to the police made after she invoked her right to remain silent and (2) there was no substantial evidence to support the special circumstance finding.

Finally, with respect to her punishment, Nash contends the trial court was required to impose an individualized sentence because she was 15 years old at the time of the

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[1]All further statutory references are to the Penal Code unless otherwise noted.

[2]On its own motion, the court consolidated the appeals filed by Nash and Moses. Moses' appeal was originally designated case No. F066278 and is now consolidated with Nash's appeal under case No. F066160.

[3]All further rule references are to the California Rules of Court.

offense and the sentence she received of 25 years to life in prison constitutes cruel and unusual punishment.

In his appeal, Moses argues the trial court erred by denying defendants' joint *Wheeler/Batson*[4] motion. Nash joins in and adopts this contention.

Moses also contends the state and federal prohibitions against cruel and unusual punishment preclude a sentence of LWOP for minors. (Moses was 17 years old at the time of the offense.) Alternatively, he argues the trial court abused its discretion by imposing LWOP instead of 25 years to life given the circumstances of his case.

In our first opinion, we addressed these claims and affirmed Nash's judgment. (*People v. Nash* (July 1, 2015, F066160/F066278) [2015 Cal.App.Unpub. Lexis 4682, 2015 WL 4041718] [nonpub. opn.].) In Moses' case, we vacated his sentence, remanded for resentencing under the guidance of *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*), and otherwise affirmed.

The California Supreme Court granted review in the case and returned it to this court with directions to vacate our prior opinion and reconsider the cause as to Nash in light of *People v. Franklin* (2016) 63 Cal.4th 261, 269 (*Franklin*) and *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*). (*People v. Nash*, rev. granted Oct. 14, 2015, S228198.) We modified our opinion, reversed the special circumstance finding as unsupported by substantial evidence under *Banks* and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), and remanded the matter to the trial court under *Franklin* to determine whether Nash was afforded sufficient opportunity to make a record of information relevant to her eventual youth offender parole hearings and, if not, to afford her that opportunity. (*People v. Nash* (Nov. 14, 2016, F066160/F066278) [2016 Cal.App.Unpub. Lexis 9466; 2016 WL 6683048] [nonpub. opn.].)

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[4] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part in *Johnson v. California* (2005) 545 U.S. 162, 168; *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

The California Supreme Court again granted review in the case and returned it to us with directions to vacate our opinion and reconsider the cause in light of the following issue: "Does Proposition 57 retroactively apply to cases in which the judgment is not yet final?" (*People v. Nash*, rev. granted Feb. 15, 2017, S239011.) Following supplemental briefing, we now modify the opinion. In accordance with our recent decision in *People v. Marquez* (2017) 11 Cal.App.5th 816 (*Marquez*), review granted August 15, 2017, S242660, we reject defendants' argument that Proposition 57 applies retroactively and we reject their constitutional challenges. We also conclude Nash and Moses lack entitlement on remand to a transfer hearing under Proposition 57.

PROCEDURAL HISTORY

In October 2010, the Kern County District Attorney filed an information against Moses, Nash, and Nash's older sister, Angelique Elandra Nash.[5] All three defendants were charged with premeditated murder (§ 187), and the district attorney alleged they committed the murder while engaged in the commission or attempted commission of burglary (§ 190.2, subd. (a)(17)(G)). It was further alleged Moses and Angelique were 16 years of age or older at the time they committed the offense (Welf. & Inst. Code, § 707, subd. (d)(1)), and Nash was 14 years or older at the time she committed the offense (*id*., subd. (d)(2)).

On July 16, 2012, Nash's attorney filed a motion to suspend proceedings pursuant to section 1368. In his supporting declaration, Nash's attorney stated, "[B]ased on the last three attempted interviews and trial preparation with [Nash], it has become apparent to me that [Nash] cannot meaningfully assist in her defense nor comprehend the proceedings against her." Two days later, the trial court suspended the proceedings and appointed a psychologist to examine Nash. In August 2012, a jury trial on Nash's competence was held, and the jury found Nash competent to stand trial.

[5]For brevity and clarity, we refer to Angelique Elandra Nash, who is not an appellant in this case, by her first name.

Moses, Nash, and Angelique were tried together. During jury selection, Nash's attorney made a *Wheeler/Batson* motion, which the other two defendants joined; defense counsel argued the prosecutor was targeting women and Hispanic women. The trial court found a prima facie showing under *Wheeler/Batson*, and the prosecutor offered his reasons for exercising his peremptory challenges. Finding the prosecutor's explanations nondiscriminatory and credible, the court denied defendants' motion.

The jury found Nash and Moses guilty of murder and found the burglary special circumstance allegation true. The jury could not reach a verdict as to Angelique, and the court declared a mistrial in her case.

The trial court sentenced Moses to LWOP. Nash received a sentence of 25 years to life in state prison.

FACTS

On the afternoon of April 14, 2010, Andrew Masengale visited his grandmother Dorothy Session, at her house on Camino Sierra, located in the greater Bakersfield area.[6] Session was not feeling well, and she told Masengale she was going to take some Tylenol and lie down for a while until she had to pick up her son John at work. Around 3:15 p.m., Masengale left the house, locking the back door as he left. He always used the back door at Session's house, as did everyone who knew her. Session usually left the back door unlocked when she was home so she could tend to her garden, but she would lock the back door if she were going to lie down. The front door was always locked.

Neighbors of Session reported seeing a man and two women in the area that afternoon. Patricia Sandoval lived on a cul-de-sac off Camino Sierra. Sometime between 2:00 and 4:00 p.m., she noticed her dogs were barking, and she went to the front door. She saw a male at her door and two females standing at the front of her driveway. Sandoval opened the door and asked if she could help them. One of the women asked if

[6] All further dates in this section occurred in 2010.

Matthew was there. Sandoval told them no one by that name lived there, and the three walked away. Later that night, Sandoval reported this incident to law enforcement. She described the man as Black, about six feet tall, wearing a red shirt, black gym shorts, and about 19 or 20 years old. The woman who spoke to Sandoval was short, a little wide and her hair was colored and worn in braids. The other woman was taller and wider than the woman Sandoval talked to.

Janet York lived two doors down from Session on Camino Sierra. Around 4:00 p.m., her dog started barking, and York noticed a young woman standing at the end of her front porch and looking over her fence. York thought the woman was Hispanic but agreed she could have been light-skinned Black. The woman asked if Erika was there. York also saw a young man and woman standing at the front of her driveway by the street. The man appeared to be Black and about 19 or 20 years old; the woman appeared to be Hispanic or light-skinned Black and about the same age. York told the woman on her porch that no one named Erika lived there, and the woman left.

Kimbria Lopez's parents were Session's next door neighbors on Camino Sierra. That day, Lopez took her mother shopping, and the two of them returned to Lopez's parents' house around 3:45 to 4:00 p.m. At that time, Lopez saw Session on her front porch; Session retrieved her mail, walked back inside her house, and closed the front door. Lopez's son Jacob, who was 14 years old, did not go shopping with his mother and grandmother, and instead stayed at Lopez's parents' house all afternoon with his grandfather. At some point, Jacob went to the bathroom, which had a window looking out on Session's driveway and house. Through the bathroom window, he saw a woman walking in the middle of Session's driveway. She wore an orange shirt and jeans. At trial, he identified Angelique as possibly the woman he had seen near Session's house.

Around 6:00 p.m., Masengale received a call from his mother asking him to check on Session because she had not picked up his Uncle John from work. Masengale and his friend Megan Winder drove to Session's house. They entered through the back door,

which was closed but unlocked. There were no signs of forced entry. Masengale noticed a buzzer for the oven was on, and he turned it off. He stepped on Session's glasses, which were on the floor. Then he noticed some blood on a chair and he walked around and found Session lying on the floor in the dining room. There was dried blood all over her face and she was throwing up blood. She was still conscious.

Winder called 911, and Masengale spoke to the dispatcher. Winder went outside where she saw a California Highway Patrol (CHP) officer and flagged him down. Masengale starting talking to Session. He asked her if she fell, and she said no. She said a Black man and Black woman were in the house and they wanted money. She asked Masengale to check for her purse. He found her purse in a dresser drawer in her bedroom. It appeared the bedroom had not been touched and nothing had been taken from her purse. Nothing appeared to be out of place in the house.

Richard Pierce was the CHP officer Winder flagged down. He arrived at Session's house at 6:35 p.m. Pierce knelt down beside Session and tried to make sure her airway was open. He asked Session "who had done this," and eventually Session said it was a young Black man. Pierce asked "how many had done this," and she responded two. He asked her to describe the second man, and Session stated it was a female. She did not identify the woman's race or ethnicity.

Kern County Sheriff's deputy Joe Weiss responded to Session's house based on a dispatch report of a victim beaten in her home. In the house, he observed Pierce giving Session first aid. Weiss asked Session "who did this" and she said a Black male and a Black female. Within a few minutes, additional law enforcement officers and ambulance and fire department personnel arrived.

Session was 81 years old. She was taken to Kern Medical Center by ambulance and died later that night.

Criminalist Jeanne Spencer arrived at Session's house shortly after 10:00 p.m. to investigate the crime scene. She observed blood spatter and blood stains in the den and

kitchen. In the den, there were blood stains on the floor in front of the fireplace, in front of a chair next to the fireplace, and near another chair that was next to the entry to the dining room. Blood was also spattered on the fireplace. A right shoe was found in the den near the entry to the kitchen. A tooth and what appeared to be dental hardware were lying on the floor near the fireplace. A left shoe and a tooth were found in another area of the den near the entry to the dining room. There were more blood stains in the dining room. In the kitchen, there was blood spatter on the side of the stove and at the threshold to the den. A Wave brand cigarette butt was found in the kitchen near the back door and collected as evidence.[7]

Based on the pattern of blood spatter, Spencer concluded there had been at least two events in the house: one event in the kitchen area by the entry to the den and another event in the den near the fireplace. Spencer characterized most of the blood spatter in these areas as "impact spatter," meaning the spatter was likely caused by a forceful event such as a punch to the victim. She also observed linear marks on the floor suggesting the victim had been dragged a short distance in the den near the entry to the kitchen.

Forensic pathologist Lesley Wallis-Butler conducted an autopsy of Session the next day. Wallis-Butler observed "quite a bit of facial trauma." Session had a fractured nose, significant bruising over both eyes, and an abrasion on the center of her nose with a laceration that extended down the right side of her nose. She had a laceration that tore through the outer and inner part of the upper aspect of her lip and another laceration to the inner aspect of her upper lip. Session appeared to have been struck with such force that it tore the tissues under her lip and nose. She also had a laceration to her lower lip and a contusion to her lower lip. Session had a small contusion on her chest and bruises on the backs of her hands, her forearms, and her right elbow. In the internal examination,

[7]At trial, there was testimony that Session did not allow smoking in or near her house. In addition, a criminalist was able to find a mixture of DNA on the filter end of the cigarette butt, and she testified that she could not exclude any of the three defendants as contributors to the DNA on the cigarette.

Wallis-Butler saw injuries consistent with falling and striking the back of the head. She concluded the cause of Session's death was blunt force head trauma. Based on the facial injuries, Wallis-Butler believed Session had been struck at least twice.

Jason Balasis, a detective in the robbery-homicide unit of the Kern County Sheriff's Office, was the lead investigator for the case. He received his assignment around 8:00 p.m. on April 14, and he went to Session's house that night. He interviewed Kimbria and Jacob Lopez, York, John Session, and Masengale.

The next day, law enforcement received information about the crime from Cecilia Martinez. Martinez lived in a converted garage behind a main house on Center Street (the Center Street house). Her adult neighbors at the Center Street house were Sonja Arnold and Roxy Dukes. According to Martinez, "quite a few kids" (teenagers and young adults) also stayed at the Center Street house. Arnold's niece, Nefertiti Patterson, and Patterson's child lived there. Arnold's nephew, Darontrell Gage, and Jesse Estrada lived there. Patterson and Gage were half siblings. Moses was Patterson's first cousin, and Moses had been staying at the Center Street house for about six weeks. In addition, Patterson and Angelique had known each other for 10 years and were best friends, and Angelique would visit the Center Street house. On April 15, Martinez received information about what happened to Session from Estrada and a niece of Arnold's named Tiarny. Based on what Estrada and Tiarny told her, Martinez called a secret witness hotline.

As a result of the secret witness tip, Balasis interviewed Martinez. After speaking with Martinez, Balasis interviewed Patterson, Gage, Arnold, and Estrada, all residents of the Center Street house.

Patterson told Balasis she spoke to the three defendants on the afternoon of April 14 before 5:00 p.m. The majority of her conversation was with Angelique. Angelique told Patterson that she was going to rob the old lady until the lady started screaming. Angelique said she left the house because the old lady started screaming.

Patterson reported that, during her conversation with Angelique, Nash was crying and Moses was shaking his head and repeatedly saying, "I'm sorry, cuz."

Patterson stated that Moses said he thought the lady was still alive but he was not sure. Moses told Patterson he heard the lady making noises. Angelique told Patterson that Moses had knocked the old lady over. Angelique said that she left, but went back for Nash because she could not leave her sister, that she was going to take something from the victim's home, but she did not because the lady scared her by screaming. Nash said she did not take anything from the house. Patterson told Balasis that Angelique was wearing an orange shirt. She also reported that Moses and Nash smoked cigarettes and she was not sure if Angelique smoked. Patterson did not think any of the defendants had been drinking or smoking when she talked to them.[8]

Balasis also interviewed Gage. One of the first things Gage told Balasis was that he did not want to go to court and he did not want to be involved. Gage said he had contact with the three defendants on April 14. He indicated that he received most of his information from Moses. Gage stated that Moses told him he entered a lady's home and hit her. Moses said the lady yelled. Gage reported that Moses seemed scared and uneasy and Nash was crying.[9]

On April 17, Balasis assisted in the arrest of Nash and Angelique at a hotel. An orange shirt was found among their clothes. Balasis interviewed Nash and Angelique the

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[8]At trial, Balasis testified about what Patterson told him as described. Patterson was also called as witness. She testified she remembered talking to Balasis and generally did not dispute she made the statements as Balasis testified. However, Patterson denied or claimed not to remember the underlying facts. For example, Patterson testified she could not remember whether Angelique told her what Moses had done, even though she agreed she told the police what he had done. In a similar vein, Patterson denied she saw Nash crying, and she could not remember whether Moses said, "I'm sorry cuz," but she agreed she told the police these things.

[9]Gage's statements to Balasis were introduced at trial through Balasis's testimony. Gage was also called as witness, but he testified generally that he did not recall what Moses told him or what he (Gage) said during his interview with Balasis. For example, he testified that he did not remember whether Moses told him that the old lady yelled and he also did not remember his conversation with the police.

day they were arrested. Moses turned himself in later that day, and Balasis interviewed him the next morning.

Balasis interviewed Angelique first. She told him they were looking for Matthew's house to smoke weed. They knocked on doors looking for Matthew. Angelique stated they went to three houses. At the first house, a lady told them Matthew did not live there. Angelique said a Mexican lady answered the door at the house she went to prior to the victim's house.

Angelique told Balasis that no one answered the front door at the victim's house. Angelique stayed outside and stood by a truck. She stated she walked to the back part of the victim's house and then went back to the front of the house. She heard someone screaming, "Oh, Lord, help me," but she did not see the victim. She was wearing an orange shirt. Angelique told Balasis that, after the incident, she went to the Center Street house and told Patterson what happened. Balasis told Angelique that Patterson had told him Angelique said she was looking for a house to steal from, but Angelique denied saying this to Patterson.

Next, Balasis spoke to Nash. She told him she was supposed to be living at a group home but she was staying with her mother in Bakersfield on Niles Street. She said they walked down the street knocking on doors and asking for Matthew. She admitted that she went inside the victim's home.

Nash remembered speaking to a lady with a dog. She talked to a Mexican woman who told her Matthew did not live there. At one point during the interview, Nash told Balasis that the victim answered the back door and Nash asked if she could use the telephone. Nash said she did not take anything from the home. She told Balasis that she saw the victim and began to cry. She also said she was scared and she should have called the police.

Balasis asked Nash whether she approached a house and asked for Erika, and she remembered doing so. Initially, Nash denied she went to the victim's house to break in.

Balasis, however, told her he believed she went to steal things, and Nash admitted this was true. Nash said she intended to make sure no one was at home before she went to the back of the victim's house and the victim surprised her. She stated that, inside the house, she picked up the phone to call her sister, Sherina, to come get her. Nash told Balasis that the victim was making noises and asking for help.

Balasis interviewed Moses the next day. Moses told him that he had run away from a group home and he was originally from Bakersfield. He was staying at the Center Street house. He stated he smoked marijuana on April 14 and he was looking for someone named Matthew. Moses told Balasis he was high on KJ[10] and did not remember what happened that day, although he did remember going to houses near the victim's house and knocking on doors and asking for Erika.

Moses also told Balasis that he smoked a blunt[11] and after the high faded, he went to the Center Street house to meet up with Patterson. He said he heard details of the crime and saw his photograph on the television news on April 17 and 18, and he was scared and did not know what to do.

Moses told Balasis that he probably told Gage what he had done because he was scared. Moses told Gage he hit the lady two times.

Balasis noticed Moses' right hand looked different from his left hand. A knuckle on his right hand was very swollen. There was redness and it appeared to have fresh scabbing.

Later in the interview, Moses admitted that he wanted to break into a house to get money for food. He said he went to the victim's home and asked to use the phone. He was wearing gloves. Moses stated that he was not planning on killing anyone. He

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[10]Balasis explained that KJ refers to phencyclidine (PCP) and is often mixed with marijuana and smoked.

[11]A blunt typically refers to a marijuana cigarette with a cigar wrapper. Moses told Balasis he walked down Niles Street and bought the blunt from some Mexicans.

thought the victim had a portable emergency pager that would call 911, and he did not know if she pressed the button. The victim went to the back door. Moses asked to use her telephone to get a ride. He said the victim let him in the house but then she looked like she was scared of him. At that point, Moses thought she may have pushed a button on a device to call the police.

Moses told Balasis he struck the victim twice. The first time she was standing and the second time she was on the ground. She was saying, "oh, God," and calling for help. He stated he dragged her from the kitchen into the living room area because he did not know if anyone else was in the house. Moses thought the victim was still alive because she was making noises when he left the house. He told Balasis he was at the victim's house to get money to get something to eat. He said he asked to use the phone because the victim surprised him. Moses denied he had a weapon. He said he burned the shoes he wore that day because he was scared and he did not want to get caught.

Call records for Session's telephone number showed a call from her phone was made to a cell phone number for Moses' uncle, Mike Patterson, at 4:17 p.m. on April 14. The call lasted nine seconds.

Defense

Forensic psychologist Donald Hoagland assessed Nash and testified at trial about her cognitive deficits and psychological issues. Nash's full scale intelligence quotient (IQ) score of 76 fell in a range "between below average and mental retardation or deficiency." She had mixed receptive expressive language disorder, and she had "difficulty processing more than one stimulus at a time." In addition, she had difficulties maintaining a sense of self and was very erratic in her attitudes, plans, and behaviors. Hoagland opined an adolescent with Nash's conditions and abilities, including attention deficit hyperactivity disorder (ADHD), would not "have the reasoning ability or the words needed to understand and form or carry out plans."

Psychologist Thomas Middleton evaluated Moses. Moses' IQ of 84 fell in the borderline range. Moses was placed in a group home when he was 13, and he was treated for ADHD. Middleton diagnosed Moses with ADHD, combined type, impulse control disorder, not otherwise specified (NOS), depressive disorder, NOS, polysubstance abuse in institutional remission, physical abuse or neglect of child as victim, sexual abuse of child as perpetrator, borderline intellectual functioning, and personality disorder, NOS, with antisocial and borderline traits and paranoid and dependent features. Middleton was presented the hypothetical that "an individual enters a residence and at the time or while inside of the residence the individual strikes another because that individual panicked and thought someone was [going to] push a button—a Life Alert type of a button." He gave his opinion that this hypothetical behavior was entirely consistent with Moses' diagnoses. Assuming the hypothetical individual had taken PCP, the conditions could "result in extreme impulsivity and angry, unplanned, aggressive behavior."

DISCUSSION

I. Nash's Competency Trial

Generally, a person who is under 18 years old when she violates the law is subject to delinquency proceedings in the juvenile court. (Welf. & Inst. Code, § 602, subd. (a).) In certain circumstances specified by statute, however, the district attorney has discretion to file an accusatory pleading against a minor directly in adult criminal court. (See *id.*, § 707, subd. (d).) Here, Nash was 15 years old at the time of the offense, but the district attorney was permitted to prosecute her as an adult because she was 14 years of age or older at the time of the offense, and the charged offense is punishable by death or LWOP if committed by an adult. (*Id.*, subds. (b)(1), (d)(2)(A); § 190.2, subd. (a)(17)(G).)[12]

[12]The information alleged Nash's offense was punishable by death or LWOP if committed by an adult. An alleged murder (regardless of degree or special circumstances) and a victim who is 65 years of age or older are also circumstances that permit the district attorney to try a minor who is at least 14 years of age as an adult. (Welf. & Inst. Code, § 707, subds. (b)(1), (d)(2)(C)(iv).)

Because she was tried as an adult, Nash was subject to the competency determination procedures provided for adult criminal defendants. Nash contends that, as a matter of due process, she was entitled to the procedures of rule 5.645(d), which apply in juvenile proceedings. She raises two claims. First, she claims the trial court was required to appoint an examiner who met the qualifications listed in rule 5.645(d). Second, she faults the jury instruction on competence because it described the standard for adult criminal defendants rather than a standard of competence tailored to juvenile proceedings. We conclude Nash has failed to establish a due process violation.

A. Standard and Procedures for Competence Determination

1. Due process rights

It is well established that the criminal trial of an incompetent defendant violates the due process clause of the state and federal Constitutions. (*Drope v. Missouri* (1975) 420 U.S. 162, 171–172 (*Drope*); *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 857 (*Timothy J.*).) Further, "[b]ecause this principle is fundamental to our adversary system of justice [citation], the [United States Supreme Court] has held that failure to employ procedures to protect against the trial of an incompetent defendant is a deprivation of due process. [Citations.]" (*Timothy J.*, *supra*, at p. 857, citing *Pate v. Robinson* (1966) 383 U.S. 375, 385 & *Drope*, *supra*, at p. 172.)

The Supreme Court set forth the federal constitutional test for determining competence to stand trial in *Dusky v. United States* (1960) 362 U.S. 402 (*Dusky*). The test is whether the defendant "'has sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding—and whether [she] has a rational as well as factual understanding of the proceedings against [her].'" (*Ibid.*) It is not sufficient for the court to determine the defendant is oriented to time and place and is able to recall events. (*Ibid.*)

2. Statutory framework in adult criminal proceedings

For criminal defendants, section 1367 is intended to codify the constitutional standard. (See *People v. Welch* (1999) 20 Cal.4th 701, 777.) It provides the following definition of incompetence: "A defendant is mentally incompetent … if, *as a result of mental disorder or developmental disability*, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a), italics added.)

The procedures for determining whether a defendant is competent are provided in the sections that follow section 1367. Under section 1368, subdivision (a), if "a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall … inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent." If the defendant's attorney "informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369." (§ 1368, subd. (b).) Even if counsel informs the court he or she believes the defendant is competent, the court may order a competency hearing. (*Ibid*.)

If the court determines a trial on competence is necessary, it must suspend the criminal proceedings and appoint a psychiatrist or licensed psychologist to examine the defendant. (§§ 1368, subd. (c), 1369, subd. (a).) The court-appointed examiner is required to "evaluate the nature of the defendant's mental disorder, if any, [and] the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner *as a result of a mental disorder* …." (§ 1369, subd. (a), italics added.) Section 1369 provides the procedures for holding a trial on competence.

3. Statutory framework in juvenile delinquency proceedings

Minors subject to delinquency proceedings are entitled to due process, and this includes the right to a determination of competence. (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 857.) Procedures for determining competence in juvenile proceedings are provided in Welfare and Institutions Code section 709 and rule 5.645(d). A minor is defined as incompetent "if he or she lacks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding, of the nature of the charges or proceedings against him or her." (Welf. & Inst. Code, § 709, subd. (a).) Unlike section 1367, the definition applicable in juvenile proceedings does not require a minor's incompetence to be a "result of mental disorder or developmental disability."

If the trial court "finds substantial evidence raises a doubt as to the minor's competency," it must suspend the proceedings and order a hearing on competence. (Welf. & Inst. Code, § 709, subds. (a), (b).) "The court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency." (*Id*., subd. (b).) The court-appointed expert must "have expertise in child and adolescent development, and training in the forensic evaluation of juveniles, and shall be familiar with competency standards and accepted criteria used in evaluating competence." (*Ibid*.) Rule 5.645(d) requires additional specific experience and training for a court-appointed expert in juvenile proceedings.[13]

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[13]For example, under rule 5.645(d)(1)(C), a court-appointed expert must: "(i) Possess demonstrable professional experience addressing child and adolescent developmental issues, including the emotional, behavioral, and cognitive impairments of children and adolescents; [¶] (ii) Have expertise in the cultural and social characteristics of children and adolescents; [¶] (iii) Possess a curriculum vitae reflecting training and experience in the forensic evaluation of children; [¶] (iv) Be familiar with juvenile competency standards and accepted criteria used in evaluating juvenile competence; [¶] (v) Possess a comprehensive understanding of effective interventions as well as treatment, training, and programs for the attainment of competency available to children and adolescents; and [¶] (vi) Be proficient in the language preferred by the

"Whether an adult or a child, the question at the competency hearing is the same: Does the individual have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and a rational, as well as a factual, understanding of the proceedings?" (*In re Christopher F*. (2011) 194 Cal.App.4th 462, 468, disapproved on another point in *In re R.V.* (2015) 61 Cal.4th 181, 203, fn. 5.) In both adult criminal and juvenile delinquency cases, there is a presumption of competence, and the defendant or the minor has the burden to prove incompetence. (§ 1369; *Medina v. California* (1992) 505 U.S. 437, 449, 452–453; *In re R.V.*, *supra*, at pp. 196–198.)

4. Timothy J.

Nash's due process claims rest almost entirely on the Court of Appeal's reasoning in *Timothy J.*, *supra*, 150 Cal.App.4th 847. For this reason, before we address her claims, we consider the case in some detail.

In *Timothy J.*, the court addressed the question whether, under a prior rule of court governing competence determinations in juvenile delinquency proceedings,[14] a minor was required to show he or she suffered from "a mental disorder or developmental disability" in order to establish incompetence. (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 858.) The court held the answer was no, holding the prior rule of court "d[id] not require that the minor have a mental disorder or developmental disability before a doubt may be raised or a finding made that he [or she] is incompetent to stand trial." (*Id*. at p. 861.)

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child, or if that is not feasible, employ the services of a certified interpreter and use assessment tools that are linguistically and culturally appropriate for the child."

[14]The court considered former rule 1498(d), which was amended and renumbered as rule 5.645 effective January 1, 2007. (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 851, fn. 2.) Former rule 1498(d) provided, in part: "If the court finds that there is reason to doubt that a child who is the subject of a petition filed under [Welfare and Institutions Code] section 601 or 602 [authorizing juvenile delinquency proceedings] is capable of understanding the proceedings or of cooperating with the child's attorney, the court shall stay the proceedings and conduct a hearing regarding the child's competence." Former rule 1498(d) did not mention "mental disorder," "developmental disability," or "mental retardation."

In reaching its conclusion, the court observed that the constitutional standard as stated in *Dusky*, *supra*, 362 U.S. at page 402, does not define incompetency in terms of mental illness or disability. (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 860.) Rather, the phrase "mental disorder or developmental disability" is found in section 1367, which applies to adult criminal proceedings. The court reasoned:

> "As a matter of law and logic, an adult's incompetence to stand trial must arise from a mental disorder or developmental disability that limits his or her ability to understand the nature of the proceedings and to assist counsel. (See … § 1367, subd. (a).) The same may not be said of a young child whose developmental immaturity may result in trial incompetence despite the absence of any underlying mental or developmental abnormality." (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 860.)

Underlying the court's reasoning was the presumption that a "normal adult" would be competent to stand trial and, therefore, an adult's incompetence must be the result of an abnormality, but that presumption would not necessarily apply to young children. In other words, a young child could be incompetent simply as a result of her age-appropriate immaturity even if she is "normal." (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 861.) The court further explained:

> "Certainly no one would dispute that a three-year-old child would be incompetent to stand trial because of his or her cognitive inability to understand the proceedings or to assist his or her attorney in preparing a defense. Thus, for purposes of determining competency to stand trial, we see no significant difference between an incompetent adult who functions mentally at the level of a 10 or 11 year old due to a developmental disability and that of a normal 11 year old whose mental development and capacity are likewise not equal to that of a normal adult. Under either condition or state, the test is '"whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."'" (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 861.)

Timothy J. was a consolidated appeal, and one of the cases involved a minor named Dante, who was 11 years old at the time of the juvenile proceedings. (*Timothy J.*,

supra, 150 Cal.App.4th at p. 851.) Dante's expert witness, Dr. Edwards, determined that Dante had an IQ of 102 and "was performing in the normal range for his age with no psychological problems or personality disorders." (*Id*. at p. 853.) Nonetheless, Edwards concluded the boy was incompetent to stand trial "because he was unable to understand the issues, including the role of the courtroom participants, and the nature of the punishment." (*Id*. at p. 854.) Edwards explained that "the brain of a young child has mildly developed frontal lobes" and "[a]s the person reaches puberty around the ages of 11, 12, and 13, the myelination process takes place in the frontal lobes and the individual begins to develop the ability to think logically, abstractly, and to have a sense of the future." (*Id*. at p. 854, fn. omitted.) Both Edwards and the court-appointed expert who assessed Dante concluded that his "brain ha[d] not fully developed and he was unable to think [logically and abstractly]." (*Id*. at p. 860.)

The Court of Appeal noted the experts' conclusions were "supported by the literature, which indicates that there is a relationship between age and competency to stand trial and that an adolescent's cognitive, psychological, social, and moral development has a significant biological basis." (*Timothy J*., *supra*, 150 Cal.App.4th at p. 860, citing Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency Into Question* (2003) 18 Crim.Just. 20, 21.) The court continued, "While many factors affect a minor's competency to stand trial, 'the younger the juvenile defendant, the less likely he or she will be to manifest the type of cognitive understanding sufficient to satisfy the requirements of the *Dusky* standard.' [Citations.]" (*Timothy J.*, *supra*, at pp. 860–861, fns. omitted.) The court cited a researcher who "found that 30 percent of the 11 to 13 year olds, and 19 percent of the 14 and 15 year olds, performed at the level of mentally ill adults who have been found incompetent to stand trial in matters of understanding and reason." (*Id*. at p. 861, fn. 14, citing Steinberg, 18 Crim.Just., *supra*, p. 21.)

The court was careful to note it was not holding that age alone could be the basis for a finding of incompetency. (*Timothy J., supra,* 150 Cal.App.4th at p. 861.)

B. Facts

On July 18, 2012, the trial court heard Nash's attorney's motion to suspend criminal proceedings pursuant to section 1368. The prosecutor noted Nash's attorney had been her counsel of record for over two years but he was raising the issue of competence a week and a half before trial was set to start for all three defendants. Nash's attorney explained Dr. Donald Hoagland (a doctor appointed by the court to assist the defense in psychological forensic issues) had recently spent two days reevaluating Nash. The court stated it had no choice but to suspend proceedings. It appointed Dr. Michael Musacco to examine Nash and instructed the court clerk to ask the doctor to conduct an expedited interview so his report would be ready by July 30, 2012.

After the trial court identified Musacco as the appointed examiner, Nash's attorney requested a doctor who had experience with minors: "If I [can] briefly inquire pursuant to the *Timothy J*. case, I would ask that the court appoint someone from this list who has the experience in adolescent child development." (Italics added.) The court responded it had a list of doctors and asked Nash's attorney if he knew who qualified under the criteria requested; Nash's attorney did not know. The court stated it did not know either, "So we're going with Dr. [Musacco]."

The matter proceeded to a jury trial in August 2012. Nash presented the testimony of her expert, Hoagland, and her attorney for juvenile court matters, James Sorena. The prosecution called Musacco and two juvenile hall employees as witnesses.

1. Nash's evidence

At the time of the competence trial, Hoagland had been a licensed psychologist for 26 years, and his practice involved assessment testing and psychotherapy with a focus on adolescents. He met with Nash for two days in February 2011, one day in August 2011, and two days in June 2012. He spent up to eight hours with Nash on each occasion and

administered eight different tests, including the Juvenile Adjudicative Competence Interview. He also reviewed Nash's records, including police reports, social study reports from child protective services, and education records. Nash had been a dependent of the court since she was 10 years old. Her records reflected that Nash's mother was an addict and used methamphetamine while she was pregnant with her; Nash's father molested her and had issues with substance abuse. The potential effects of prenatal exposure to methamphetamine include abnormal brain development.

Hoagland concluded that Nash was not competent to stand trial based in large part on her poor verbal skills. He explained, "[S]he lacked understanding or ability to reason about a lot of significant issues related to her case, and also, a real concern comes from her very, very limited verbal skills." He found Nash's verbal skills fell within the mildly retarded range.[15] He gave Nash the Woodcock-Johnson test to diagnose whether she had expressive or receptive language disorders. Her ability to listen to a story and immediately repeat it back was at the level of a second grader. Her ability to recall the story the next day fell to first grade level. Her oral comprehension was at the second grade level. Hoagland concluded Nash had a "receptive and expressive language, listening and communicating language disorder."

In addition, Nash had anxiety, depression, obsessive-compulsive disorder (OCD),[16] posttraumatic stress disorder (PTSD), and biologically based ADHD; these conditions contributed to Hoagland's conclusion that Nash was not competent to stand trial. Hoagland testified that her anxiety would disrupt many aspects of her functioning and that her inability to concentrate, together with her other deficits, made her unable to follow what was happening in the courtroom. Hoagland's primary concern was Nash's

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[15]Hoagland testified Nash's overall IQ was 76 and usually a score of 70 or lower (sometimes 75 or lower) is considered retarded. Her language score, however, was 68.

[16]During one of their meetings, Nash counted the spirals in Hoagland's spiral binder, a sign of OCD. She would also count to herself in the courtroom as part of her OCD, once counting up to 5,000.

impaired language ability. She did not understand words such as "illegal," "defense," "automobile," and "tides," and she did not have the basic vocabulary or reasoning ability to understand and communicate in a courtroom.

Hoagland also reviewed Musacco's report. Musacco had given Nash the Georgia Court Competency Test (GCCT), which is composed of 21 questions and takes about 10 to 15 minutes to administer. Hoagland testified the GCCT was very simple and basic and some of the questions were "totally unrelated to whether she can assist [her defense attorney] in any way." He further opined that evidence of Nash's ability to follow directions was unrelated to whether she could comprehend the trial proceedings or assist in her defense.

Nash's second witness, Sorena, was an attorney who had represented Nash in juvenile court (in both dependency and delinquency proceedings) continuously since 2005, when she was about 10 years old. In 2005, Nash was the subject of a dependency case in which it was alleged she was the victim of neglect and abuse by her mother and father. In 2007, a delinquency petition was filed against Nash alleging two counts of battery. At that time, Sorena had doubts about Nash's competence to go to trial on the battery charges, and he filed a motion requesting an evaluation. Based on his contacts with her over the previous two years (2005–2007), Sorena found Nash to be very naïve and immature. He testified, "[F]acing the formalities of a full trial, … I wasn't confident in my own mind that she would be qualified or mentally endowed … to assist me in the course of a full trial." At all times, Nash has seemed to Sorena to be younger than her chronological age. At 10 years old, Nash struck Sorena as being like a seven- or eight-year-old; when Nash was 17 years old (at the competency trial), she seemed more like a 13- or 14-year-old.

In the 2007 delinquency case, Sorena reached a plea agreement allowing Nash to plead to a misdemeanor battery charge, and he withdrew his request for formal evaluation of her competence. He explained, "If there was not going to be a trial, then I believed

that her level of understanding at that time was sufficient to support the entry of a plea, and so I withdrew the request." Sorena spent a lot of time talking with Nash about what her rights were and what was required of her to enter a plea. He discussed possible defenses, likely outcomes, and potential penalties with her. He testified, "It took some doing, but she understood it."

More recently, during the two years she was awaiting trial in the present case, Nash entered a guilty plea to felony resisting an officer under section 69. Sorena discussed the case in detail with Nash. He did not raise the issue of competency. He testified, "She understood [her] rights to my satisfaction that at the entry of a negotiated settlement on the case that she was able to … effectively assist counsel— [¶] … [¶] —at that proceeding under those circumstances."

2. Prosecution's evidence

Musacco, the court-appointed examiner, concluded Nash was competent to stand trial.

Musacco had been a licensed psychologist since 1995. He was on a panel of experts who were appointed by the court to conduct evaluations. As part of an evaluation, he interviews the subject, asking background information such as educational and mental health treatment history, and conducts a mental status examination and psychological testing. The court instructed examiners to administer three tests: an IQ test, a malingering test, and a test of trial competency.

The prosecutor asked Musacco what definition of competency he applies when conducting an evaluation. He responded as follows:

> "Now the legal definition in our state is in order to be found incompetent, the person has to suffer from a mental illness or a mental disorder which causes them to be unable to understand the courtroom procedures, to be unable to understand the outcome of their case, or if they're unable to assist their attorney in their defense.

> "So they have to be able to know that there's a lawyer that's on their side. There's another lawyer that's trying to convict them. They have to know what their charges are, and if they're convicted, they have to have an understanding of what type of sentence they might receive out of that.
>
> "So if the person has a mental disorder which inhibits their comprehension or understanding or their ability to … assist their attorney, then they can be found incompetent to stand trial."

Musacco met with Nash in July 2012 at juvenile hall. He had very little information about her prior to the meeting. He spent from 50 minutes to an hour with her. He believed she was being honest with him, and he saw no evidence she was trying to manipulate or exaggerate. Nash told him about her childhood. Musacco described her childhood as difficult and chaotic. There was abuse and neglect, she lived in a series of group homes, she developed symptoms of depression and a conduct disorder, she ran away from home, and her school performance was affected.

In the mental status examination, Nash said she was sad, irritable, and upset. Her self-esteem was low, and she had suicidal thoughts and had made attempts before. Her symptoms were consistent with major depression and PTSD, but there was no evidence of psychosis.

Nash scored 75 on a nonverbal intelligence test, which Musacco described as "in the borderline range." Nash scored at the sixth grade level on a test of reading ability.

Musacco tested Nash with the GCCT. He described the test as "fairly easy to administer and score and [it] addresses the major areas of trial competence." Scores above 70 are considered passing, scores of 60–70 are marginal, and a score below 60 would be considered failing. Musacco asked Nash what the judge does at trial, and she said he listens to her attorney and the prosecutor and "gives us time." Musacco asked if she meant a "sentence" and she said yes. Musacco took this to mean she understood the judge would impose a sentence if she were found guilty. Nash said the jury finds out whether she is guilty or not. She said her lawyer was supposed to help her. Musacco asked how her lawyer was supposed to help her. She responded, "Well, he offers me

encouragement," and, after Musacco followed up, she said, "He tells the people why I'm not guilty." Nash said the prosecutor is "supposed to do the opposite of my attorney," witnesses "tell what happened," and people attending the trial "sit quietly." She said during trial she would not talk and she would listen and pay attention.

Nash knew the names of her criminal defense attorney and her attorney for juvenile court matters and knew how to fill out a slip at juvenile hall in order to contact them. Musacco asked how she could help her attorney defend her and she responded, "Tell him what happened." She said she had done that. Nash felt her attorney was looking out for her and was trying to help her. She said she was charged with murder, which means "you killed someone," and conspiracy, which is "when you're with someone who did something." Nash told Musacco, "They said I helped David [Moses] kill a lady." "They said we were going to rob someone. And we didn't know the lady was there, and we got scared." She believed if the jury found her guilty, she could be sentenced to 15 years to life in prison.

Musacco gave Nash a score of 90 out of 100, within the passing range. In direct examination, the prosecutor asked Musacco if Nash understood the roles of the various parties, the charges, and the basic facts. Musacco responded, "Really she had no difficulty understanding any of these questions." While the test was not a definitive measure of competence, in Nash's case, her GCCT test score "was consistent with the rest of the data that [Musacco] had, which she is able to understand what's going on, she can assist her attorney, and she knows what her potential penalties are." He testified, "There's really no question of it" and concluded Nash was competent to stand trial.

Musacco also reviewed Hoagland's report. Musacco testified the report "went into minutia and details of very fine points of things, like academic functioning and neuropsychology, which is perfect for a neuropsychological evaluation, but may be … irrelevant to the issue of trial competency." He observed that, in 20 years of doing

competency evaluations, he had never seen an evaluation even half as long as Hoagland's report. (Hoagland's report was over 50 pages.)

Musacco further opined that Nash's scores from Hoagland's testing were not consistent with mild mental retardation. He testified a person who has mental retardation would have a global depression in intelligence (verbal, visual, motor, attention), but Nash's test results showed strengths and weaknesses, suggesting she had a learning disability or possibly a head injury. He noted Nash's records showed she had been diagnosed with a learning disability, not mental retardation, through the school system.

Standing by his opinion that Nash was competent to stand trial, Musacco expanded on his explanation of what is required to find a person incompetent: "In order to be found incompetent to stand trial, it has to be due to a mental disorder or a disease. A learning disability would not be that type of mental disorder. Mental retardation would. Schizophrenia could. But not a learning disability." As part of an evaluation, Musacco considers the person's ability to communicate. In Nash's case, "there was no difficulty with that in terms of a give-and-take conversation."

In cross-examination, Musacco indicated an expressive language disorder would be considered a learning disability. He did not test for such disorders, but Nash did not appear to him to have an expressive or receptive language disorder. Musacco thought her ability to communicate was commensurate with her level of intelligence. He did not ask Nash whether she understood the proceedings in court beyond asking about the roles of various court personnel. He did not ask her if she had any problems concentrating.

At the time of the competence trial, witness Maribel Vega worked in the Kern County Probation Department assigned to juvenile hall. She processed juveniles and supervised them during program activities. Vega conducted Nash's intake when she entered juvenile hall in April 2010. Nash had been in custody since then, so Vega had about two and one-half years' experience observing and interacting with her.

Nash had been placed on administrative restriction several times for manipulating staff. Generally, this meant Nash tried to get away with rule violations if less experienced staff were on duty. She also got in trouble for defiance and profanity toward staff. "Junior staffing" is a rule violation in which a juvenile "that has been in custody for a longer period of time … attempts to give instruction and ways to get around the system and the program within the facility to other juveniles." Nash had rule violations for junior staffing. Vega testified that, in her interactions with Nash, Nash always seemed to understand what Vega was talking about.

Nash was not allowed to go to classrooms with other children at juvenile hall. She did her schoolwork by herself independently in her room. A teacher would tutor her in her room for 30 minutes, three or four times per week.

Maria Lopez, a juvenile correctional officer at juvenile hall, had known Nash for 11 months. She observed that Nash would have a different tone depending on the staff. She was very professional with Lopez, but she could be rude to other staff. Lopez had counseled Nash on rules violations and never noticed Nash did not understand what she was talking about.

C. Analysis

Nash was prosecuted as an adult, but she was 17 years old at the time of her jury trial on competence. The questions she raises are (1) whether she was entitled to an appointed expert who met the qualifications of rule 5.645(d) and (2) whether the trial court erred by giving a definition of competence applicable to adults rather than the standard described in *Timothy J*. and rule 5.645(d).[17]

[17]Consistent with *Timothy J*., rule 5.646(d)(1)(A) suggests that a child's incompetence may be the result of developmental immaturity or other condition, and a finding of mental disorder or developmental disability is not required. The rule provides: "The court must appoint an expert to examine the child to evaluate whether the child suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the child's competency."

1. The trial court was not required to appoint an examiner who met the qualifications of rule 5.645(d) as a matter of due process

The procedures of Welfare and Institutions Code section 709 apply only "[d]uring the pendency of any juvenile proceeding." (*Id.*, § 709, subd. (a).) Likewise, the procedures of rule 5.645(d) only apply to "a child who is the subject of a petition filed under [Welfare and Institutions Code] section 601 or 602." (Rule 5.645(d)(1).) In this case, there was no "juvenile proceeding" or "petition filed under [Welfare and Institutions Code] section 601 or 602" because the district attorney elected to charge Nash in adult criminal court. Accordingly, by their own terms, Welfare and Institutions Code section 709 and rule 5.645(d) did not apply to Nash's competency trial in adult criminal court. (Cf. *In re Christopher F.*, *supra*, 194 Cal.App.4th at p. 469 [juvenile proceedings are governed by provisions of the Welf. & Inst. Code, and Pen. Code, § 1369 does not apply].) Instead, the provisions of the Penal Code, including section 1369, applied to Nash. (See *In re Christopher F.*, *supra*, at p. 469 [on its face, § 1369 applies to adult criminal proceedings].)

Although not called for as a matter of statute, Nash claims she was entitled to the "more specific rule 5.645 and the standard articulated in *Timothy J*." as a matter of due process. She acknowledges that her case was properly in the adult criminal court, but asserts "the fact remains that [Nash] was a minor at the time she was evaluated for competence to stand trial" and the "failure to appoint an expert who met the qualifications to evaluate a minor for competency violated her rights under the federal Constitution to due process and a fair trial, as well as her Eighth Amendment right to a reliable guilt proceeding." We disagree.

The federal due process clause requires states to "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial." (*Drope*, *supra*, 420 U.S. at p. 172.) Here, the trial court appointed an examiner with experience in assessing competence. Nash presented her own expert and her juvenile

court attorney as witnesses, and her attorney cross-examined the prosecution's witnesses. We believe the procedures used were adequate to protect Nash's rights.

Nash asserts that Musacco apparently lacked special expertise in evaluating children, but she does not explain how this fact denied her due process in the circumstances of her case. She does not, for example, point to any evidence showing that minors who are 17 years old (as she was at the time of her competency trial) are significantly developmentally or psychologically different from adults who are 18 years old. Further, the question for the examiner and trier of fact—"Does the individual have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and a rational, as well as a factual, understanding of the proceedings?"—is the same whether the subject is an adult or a minor. (*In re Christopher F.*, *supra,* 194 Cal.App.4th at p. 468.)

Nash claims the only examiner who met the "statutory qualifications" (presumably referring to rule 5.645(d)) to evaluate Nash "as a minor" was Hoagland but, again, she has not explained how this rendered the competency trial inadequate. Hoagland's opinion does not appear to be based on Nash's age or age-related brain development. We have found nothing in Hoagland's testimony similar to the testimony in *Timothy J.* from two experts that Dante's brain had not fully developed.[18] (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 861.) Nor do we see any citation to "literature" supporting a theory that 17 year olds are unlikely to be competent to stand trial for some biological reason. (Cf. *id*. at p. 860.) On the record before us, we cannot say a court-appointed examiner who met the requirements of rule 5.645(d) was required in this case as a matter of due process.

[18]As we have described, Hoagland's primary concern about Nash was her verbal impairment. On cross-examination, he was asked what the treatment would be for Nash's cognitive issues. Hoagland answered that she would require a variety of treatment and also observed, "You couldn't fix retardation." Nothing in his response suggested that growing older could improve Nash's conditions.

For her position, Nash cites recent United States Supreme Court cases dealing with the punishment of defendants who were minors when they committed their crimes. (See *Miller v. Alabama* (2012) 567 U.S. 460, 489 (*Miller*) [mandatory LWOP for juveniles without consideration of their age, age-related characteristics, and nature of their crimes violates Eighth Amendment's principle of proportionality]; *Graham v. Florida* (2010) 560 U.S. 48, 82 (*Graham*) [Eighth Amendment prohibits imposition of LWOP for a juvenile offender who did not commit homicide]; *Roper v. Simmons* (2005) 543 U.S. 551, 578 (*Roper*) [Eighth and Fourteenth Amendments prohibit imposition of the death penalty for offenders who were under 18 years old at time of their offenses].)

In these cases, the high court recognized that "children are constitutionally different from adults *for purposes of sentencing*." *(Miller*, *supra*, 567 U.S. at p. 471, italics added.) In the context of punishment, the high court held that juveniles are less deserving of the most severe punishments because they have "diminished culpability and greater prospects for reform." (*Ibid*.) The court relied, in part, on "'psychology and brain science.'" (*Ibid*.)[19]

These cases, however, have nothing to do with competence determinations for minors. In *Miller*, *Roper*, and *Graham*, the high court did not consider what procedures are adequate to protect a minor's right not to be tried while she is incompetent to stand trial. To the contrary, the cases all involved minors who were found guilty of crimes and

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[19]In *Miller*, the court described the scientific research it relied on in *Roper* and *Graham*:

"Our decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well. [Citation.] In *Roper*, we cited studies showing that '"[o]nly a relatively small proportion of adolescents"' who engage in illegal activity '"develop entrenched patterns of problem behavior."' [Citation.] And in *Graham*, we noted that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.' [Citation.] We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his '"deficiencies will be reformed."' [Citation.]" (*Miller*, *supra*, 567 U.S. at pp. 471-472, fn. omitted.)

sentenced to death or LWOP, circumstances that presuppose the minors were competent to stand trial. As a result, these cases are not particularly relevant to Nash's claim, and they certainly do not suggest that the appointment of an expert who met the qualifications of rule 5.645(d) was required in this case as a matter of due process.

We do not believe *Timothy J.* supports Nash's claim either for several reasons.

First, Nash contends that *Timothy J.* requires the court apply rule 5.645 as a matter of due process simply because she was under the age of 18. *Timothy J.* does not support that contention. The opinion specifically qualifies its holding by stating that "we do not hold that age alone may be the basis for a finding of incompetency." (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 861.)

Second, the Court of Appeal in *Timothy J.* was asked to interpret a rule of court in a juvenile proceeding. It was not asked to identify constitutionally required procedures for determining competence for a minor charged as an adult.

Third, to the extent *Timothy J.* does suggest that due process may require treating young children differently from adults in competency determinations, this does not help Nash because she was not a young child at the time of her competency trial. Nash was 17 years old at the time of her competency trial. The minor in *Timothy J.* was 11 years old. As we have discussed, the *Timothy J.* court presumed that a normal adult would be competent to stand trial, but concluded this presumption may not be appropriate for "a *young* child whose developmental immaturity may result in trial incompetence despite the absence of any underlying mental or developmental abnormality." (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 860, italics added.) The court cited expert evidence that significant development occurs in the brain at puberty around the ages of 11 to 13. The court also noted there was "no significant difference between an incompetent adult who functions mentally at the level of a 10 or 11 year old due to a developmental disability and that of a normal 11 year old whose mental development and capacity is likewise not

equal to that of a normal adult." (*Id.* at p. 861.) Thus, the court focused on the limited brain development and cognitive ability of young children up to around ages 11 to 13.

Arguably, *Timothy J.* might be helpful to Nash if she had been a young child at the time of the competency evaluation and trial, but she was not.[20] When she met with Musacco, Nash was less than five months shy of her 18th birthday. The Court of Appeal in *Timothy J.* did not consider older minors such as Nash. (And, as we have mentioned, Nash did not present evidence suggesting 17-year-old minors are different from 18-year-old adults in any way relevant to competence determinations.) For this reason, we do not read *Timothy J.* as support for Nash's claim that due process required the trial court to employ rule 5.645(d)—a rule that, on its face, did not apply—solely because she was 17 years old at the time of her competency trial.

Finally, in her reply brief, Nash notes that the United States Supreme Court has determined what constitutes cruel and unusual punishment based on "the 'evolving standards of decency that mark the progress of a maturing society.'" (*Thompson v. Oklahoma* (1988) 487 U.S. 815, 821.) She urges this court to decide her due process claim based on the same notion of evolving standards of decency. This argument is unavailing because she has offered no evidence or case law showing evolving standards of decency require the application of rule 5.645(d) in a competency trial involving a 17-year-old minor tried as an adult.

2. The jury instruction on competence did not violate due process

The trial court instructed the jury on competence in relevant part:

> "You must decide whether [Nash] is mentally competent to stand trial. That is the only purpose of this proceeding.…

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[20] While the *Timothy J.* court focused on children from ages 11 to 13, the court did cite a study showing that 19 percent of 14 and 15 year olds performed at the level of mentally ill incompetent adults. (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 861, fn. 14.) The court made no mention of the performance of 16 and 17 year olds, however. At best, Nash could argue that *Timothy J.* suggests children up to age 15 should not be treated like adults for purposes of competency determinations.

> "[Nash] is mentally competent to stand trial if she can do all of the following: Number one, understand the nature and purpose of the criminal proceedings against her; number two, assist in a rational manner her attorney in presenting the defense; and three, understand her own status and condition in the criminal proceeding.
>
> "The law presumes that a defendant is mentally competent. In order to overcome this presumption, the defendant must prove that it is more likely than not that the defendant is now mentally [in]competent because of a mental disorder or developmental disability.
>
> "A developmental disability is a disability that begins before a person is 18 years old and continues or is expected to continue for an indefinite period of time. It must be a substantial handicap and does not include other handicap conditions that are solely physical in nature.
>
> "Examples of developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and conditions closely related to mental retardation or requiring treatment, similar to that required for mentally retarded individuals."

Nash does not dispute that this is a correct statement of the law under sections 1367 through 1369. Her trial counsel neither objected to nor requested a different instruction. Nonetheless, she argues the instruction violated due process in her case because it provided that incompetence must be because of "a mental disorder or developmental disability" and did not allow incompetence to be based on developmental immaturity. She relies solely on *Timothy J.*, *supra*, 150 Cal.App.4th at pages 861–862.

As we have explained, however, *Timothy J.* does not support Nash's argument because she was not a young child at the time of her competency trial. The *Timothy J.* court reasoned:

> "As a matter of law and logic, an adult's incompetence to stand trial must arise from a mental disorder or developmental disability that limits his or her ability to understand the nature of the proceedings and to assist counsel. [Citation.] The same may not be said of a young child whose developmental immaturity may result in trial incompetence despite the absence of any underlying mental or developmental abnormality." (*Timothy J.*, *supra*, 150 Cal.App.4th at p. 860.)

The evidence in the *Timothy J*. case focused on children who had not yet reached puberty, but also included studies of children up to 15 years old. (*Timothy J.*, *supra*, 150 Cal.App.4th at pp. 854, 860–861.)

Nothing in *Timothy J*. suggests a 17-year-old is likely to be incompetent because of developmental immaturity without any underlying disorder. Nash did not present any evidence regarding the brain development of older minors such as herself. Dr. Hoagland did *not* testify that a 17 year old is developmentally different from an 18 year old or that Nash's brain was not fully developed. Thus, Nash did not present evidence even implicating a due process analysis under *Timothy J*.

Dr. Hoagland applied the adult standard in concluding Nash was incompetent. He testified her incompetence was due to multiple mental disorders. The People's expert concluded otherwise. Both sides also presented lay witness testimony about her competence. The jury considered all of the evidence and found she was competent.

The record in this case does not require us to decide whether the jury should have received an instruction on incompetence mirroring Welfare and Institutions Code section 709 because Nash did not object to the Penal Code section 1367 instruction, did not request a different instruction, her own expert used the section 1367 definition, and no *Timothy J*. evidence was introduced. On the record before us, we cannot say the jury instruction given was not "adequate to protect [Nash's] right not to be tried or convicted while incompetent to stand trial." (*Drope*, *supra*, 420 U.S. at p. 172.)[21]

We have rejected Nash's claim that age alone mandates she receive the benefit of Welfare and Institutions Code section 709's definition of incompetence. We likewise reject the Attorney General's contention that the competence of any juvenile tried as an adult must always be adjudicated according to the definitions and procedures of the adult

[21]Nash has called our attention to the recent California Supreme Court case decision of *In re R.V.*, *supra*, 61 Cal.4th 181, but that decision did not address the issue presented here, namely, the manner in which a minor's competency is to be determined when tried as an adult.

courts. While this contention finds support in the statutory language, it does not necessarily answer due process concerns in every case. Accordingly, we do not hold the due process clause will *never* entitle juveniles tried as adults to an incompetence instruction broader than Penal Code section 1367, such as Welfare and Institutions Code section 709. Instead, we hold that on this record the jury instruction given did not violate Nash's due process rights.

Finally, we deem any instructional error harmless. Since Dr. Hoagland utilized the adult standard in reaching his opinion, which the jury found unpersuasive, we believe beyond a reasonable doubt the same result would have occurred even if a broader jury instruction on incompetence (e.g., Welf. & Inst. Code, § 709) had been given. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Huggins* (2006) 38 Cal.4th 175, 193–194 [declines to resolve question whether *Chapman* or *People v. Watson* (1956) 46 Cal.2d 818 standard of prejudice applies to error in competency instruction].)

II. Admission of Nash's Statements to Law Enforcement Officers

After Nash was taken into custody, she was interviewed by Balasis and Detective Kavin Brewer, and the interview was videotaped. Balasis read Nash her *Miranda*[22] rights, and she does not dispute she responded affirmatively when asked if she understood her rights and then voluntarily waived her rights.

After answering questions for about 35 minutes, Nash stated she wanted her sister and she did not "want to do this anymore," but the questioning continued. The detectives ended the interview about 12 minutes later, when Nash said she wanted her lawyer. Nash contends her request for her sister and her statement that she did not "want to do this anymore" constituted a clear invocation of her right to terminate the interview and, as a result, evidence of her subsequent statements to the detectives should have been suppressed. In the alternative, Nash asserts the statements she made after she said she did

[22] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

not want to do this anymore were involuntary because the detectives employed trickery. We conclude there was no error in admitting evidence of Nash's statements at trial.

A. Facts

1. Nash's interview

Balasis advised Nash of her *Miranda* rights and then asked her background information, such as where she was living, her age, and her grade in school. In response to a question about her full name, Nash stated her name and then asked, "Where'd you guys take my sister?" Balasis told her Angelique was in the other part of the building and continued asking questions.

Balasis told Nash they had just finished talking with Angelique and "she pretty much told us everything that happened." He said they now wanted to get Nash's version of what happened. Nash began by telling Balasis she was watching television with Angelique. Moses came and told them they needed to go to Matthew's house to go smoke some weed. Nash said they were all knocking on doors asking for Matthew. She went to a house with Moses, and "he said something about using the phone." Nash told the detectives, "[T]he next thing you know … I heard … (sound) … and then I got scared." Nash demonstrated the sound she heard by making a fist with her right hand and punching her left palm.

Balasis then asked to go through what happened "detail by detail." Nash said she did not remember which doors she knocked on. Balasis asked whether she remembered a lady with a dog, and Nash responded affirmatively. Nash said she could not remember that day because it was hard. She told the detectives, "[W]e didn't know this was gonna happen," "I swear we didn't," and "I'm so sorry." She began to cry again.

Later in the interview, Nash said Moses went up to the victim's house while she and Angelique waited near a truck parked on the street. Moses returned and told her it was Matthew's house, so Nash went with him to the back door. She thought the victim was Matthew's grandma. She said she was going to use the telephone. She picked up the

phone and put it back down. Nash told the detectives she heard Moses say, "They're coming," and then she heard a sound like Moses hit the victim. Nash ran and got Angelique.

Nash said that when she went to the back door with Moses, the door was open but the screen door was closed. Moses knocked on the door and the victim answered. Nash asked if she could use the phone, and the victim said yes. Balasis asked whether the victim actually opened the door for her and Moses to go in the house, and Nash began to cry again. She said she heard "maybe two or three" hits or smacking sounds but she did not see Moses hit the victim. Balasis asked what the victim was doing, and Nash responded, "Just screaming." Nash said: "She was like, 'Ahh, help.' And then I got so scared. And I didn't want to call the police 'cause I'm on the run. And I didn't want to get caught. So … I should have just called the police."

Brewer asked Nash if she remembered asking for Erika. She said they "were gonna go to Erika's but … turned out to be Matthew." About 29 minutes into the interview, Brewer confronted Nash with information (from Patterson and Gage) that they were not looking for Matthew but were looking for a house to break into. Nash denied this.

Balasis urged Nash to be "a hundred percent honest" because if she were not truthful about some things, "it makes it look like you're lying about other things." The questioning continued:

> "Balasis: [E]ven if it might not be a really good thing for you … it makes the rest of your story believable because we can prove what happened there. You know what I mean?
>
> "Nash: Yeah.
>
> "Balasis: And we can prove what happened here.
>
> "Nash: Right.

"Balasis: So, you know, that's why it's important that you're honest about every detail. And not leave out even a little … the, stuff like this that, that … may make you look a little bit bad.

"Nash: (Inaudible.)

"Balasis: Okay? Just because you guys were … doing that, doesn't mean that you wanted this thing to happen to this woman[.] Okay[?] It's two separate dif— … two, two different things, okay?

"Nash: But we didn't … we didn't go for break … breaking. We didn't … we didn't go to break in anybody houses. I'm telling you—"

Balasis then told Nash that was not what Angelique told "people over there on Center Street," including Patterson. Balasis said Angelique told people they were looking for a house "to get money or weed from." The interview continued:

"Nash: So who told you this? I want to know who told you this. Because—

"Balasis: [Angelique] told me this … just now.

"Nash: She told you we were going to go break in some houses?

"Balasis: Yes. Not at first, but when I told her that Titi [Patterson] had already told us … she told me. She broke down and told me. Okay? Because she knows … that the most important thing to do is be honest in this whole thing. Because … if you're lying about this … how do I know that you're not lying about the other part? Okay?

"Nash: Well—

"Balasis: How do I know that you're not the one that hit the lady?"

Nash insisted she and her sister did not hit the victim, only Moses did. She said, "All … all I heard was a smack … and then I … like I told you, I … got scared … ran in … through the front door [¶] … [¶] … through the front door to go get my sister." Balasis responded that he wanted to know the real reason they were out in the neighborhood that afternoon and again suggested they wanted to steal.

"Balasis: … I understand that part of it … but I … what I want to get back to is the real reason why you guys were in this neighborhood. Okay? I need to hear it from you. You guys wanted to, to get some stuff, is that right?

"Nash: Not to get weed.

"Balasis: What … what was it for?

"Nash: Just … I …

"Balasis: To … some cash or something like that?

"Nash: … I was just in it. I was just in it. I don't … I just went with him.

"Balasis: Okay.

"Brewer: Okay.

"Balasis: (Inaudible).

"Brewer: What was [Moses] looking for? Was he trying to just get some TVs or whatever he could get to sell for weed?

"Balasis: Or cash or what?

"Nash: I don't know.

"Balasis: [Nash], I, I … listen.

"Brewer: You guys all left there together, [Nash]. You do … you, you do know, okay?"

At this point, about 35 minutes into the interview, Nash began to sob again. She put her hands on top of her head and leaned forward, putting her elbows on the table in front of her and hiding her face with her arms. The questioning continued:

"Balasis: And like I said … uh, we've already, we've already talked to [Angelique]. Okay? And we're gonna talk to David. Okay?

"Nash: *I want my sister. I don't want to do this anymore*.

"Balasis: Well yeah, I … I don't … I don't want to do it anymore either. I want to get it … I want to get it all behind us.

"Nash: Oh, no. I didn't do it.

"Brewer: [Nash], listen.

"Balasis: I understand." (Italics added.)

When Nash said she wanted her sister and did not want to do this anymore, she sat up and covered her face with her hands. She was still crying. The detectives continued questioning her. Nash took a tissue and stopped crying. Brewer said, "If you guys … went over there to do one thing … and [Moses] did something stupid … [¶] … [¶] … you need to tell us, okay?" Balasis said, if this was the case, "you need to let us know now." Nash responded, "But we're gonna get in trouble," and pointed to herself.[23] The interview continued:

"Balasis: We need to know what your part of it was. If you went over there to plan and kill her …

"Nash: We didn't …

"Balasis: [W]e need to hear that. Or if you went over there because we're gonna go … get into the house and maybe see if we can get some cash so we can get some weed and [Moses] went off and did something stupid, that's what we need to hear from you right now. Not this stuff that we went to go find Matthew, who doesn't exist … and Erika who doesn't exist.

"Nash: (Inaudible) it's true, it's true.

"Balasis: That part …

"Nash: Everything (inaudible).

"Balasis: [T]hat part's not true. I already know that part's not true.

"Nash: No, not that part but I'm telling you about what you just said.

"Balasis: That's true[?]

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[23]We note the transcript of the interview reads, "So we're gonna get in trouble?" However, we have watched the recording of the interview and it looks and sounds like Nash made a declarative statement with an emphasis on "we're," her intonation did not suggest a question, and she began her statement "But," not "So."

"Nash: Yes.

"Balasis: Okay. So what I just said … you guys were going to get in the houses to get cash … and he did something stupid[?] That's true[?] That's true[?] Okay."

Nash agreed with Balasis that the plan was to knock and make sure nobody was home.[24] She agreed she was not expecting the victim to be in the house and the victim surprised her. Nash said Moses went up to the victim's house first and knocked on the door. He returned and said, "it was okay," meaning nobody was there. Then Nash went into the house with Moses. Moses asked to use the phone. Nash said she really did need to use the telephone and intended to do so. She picked up the phone, and then she heard a smack. She went outside to get her sister. Nash went back into the house and the victim was in a different place. She said Moses must have dragged the victim, but she did not see him do it.

Nash told the detectives she did not touch the victim at all. She said the victim said, "'Help,'" and moaned. Brewer asked if Moses ever talked about moving the victim or putting her in a closet, and Nash said no. Balasis asked if anybody talked about putting her in closet. Nash responded, "I want my lawyer." Balasis said, "Okay," and the questioning stopped. Nash asked for her lawyer about 46 minutes after the detectives entered the interview room and about 12 minutes after she said she wanted her sister and did not "want to do this anymore."

2. Motion to suppress

Before the joint trial, Nash moved to exclude all statements she made to law enforcement officials on the grounds her statements were obtained involuntarily and in violation of her *Miranda* rights. On August 21, 2012, the trial court held an evidentiary hearing on Nash's motion. A DVD and transcript of Nash's interview were provided,

[24]Again, we note our understanding of the interview differs from the transcript, which provides that Nash's response to Balasis's questions was "(Inaudible)." We hear Nash indicate agreement with Balasis twice.

and Balasis was called to testify. Nash's attorney also indicated he planned to call psychologist Hoagland to testify regarding Nash's cognitive deficits and verbal disability. Later in the hearing, however, he informed the court that he would not call Hoagland.

The court watched and listened to portions of the interview more than once to determine whether Nash appeared to understand her *Miranda* rights. After viewing the beginning of the interview, the court stated, "[I]t certainly appears, at least at this point, absent any testimony from a healthcare professional … that, in my estimation, it's free and voluntary and non-violative of *Miranda*.")[25]

During cross-examination of Balasis, Nash's attorney asked him, "Is there a reason why you didn't ask her what do you mean by 'I don't want to do this anymore'?" Balasis responded, "No, there's not."

Nash's attorney argued her statement, "I don't want to do this anymore," was an invocation of her *Miranda* rights and everything she said after that should be suppressed. The prosecutor countered that Nash's statement was connected to her request for her sister and was not an unambiguous invocation of her right to remain silent. Further, he argued, "[W]hen she really doesn't want to talk anymore she clearly and unequivocally and unambiguously invokes her rights by saying I want my lawyer."

Denying Nash's motion to suppress any part of the interview, the court stated: "There's no unambiguous request until the end of the interview where it terminates to request counsel. The request to see her sister, she voluntarily talks right after that. Find no violation of *Miranda*."

[25]At the point it made this ruling, the court understood Nash was going to call Hoagland as a witness, but no healthcare professional testified at the hearing.

B. Analysis

1. Nash did not invoke her right to remain silent by asking for her sister and stating, "I don't want to do this anymore"

> "The Fifth Amendment to the United States Constitution, which applies to the states by virtue of the Fourteenth Amendment, provides that no person may be compelled to be a witness against himself or herself. [Citations.] In *Miranda, supra,* 384 U.S. 436, the United States Supreme Court 'adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation.' [Citation.] Pursuant to *Miranda*, a suspect 'must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.' [Citation.]" (*People v. Linton* (2013) 56 Cal.4th 1146, 1170–1171.)

"It is well settled, however, that after the familiar *Miranda* advisements are given, a suspect can waive his or her constitutional rights." (*People v. Linton*, *supra,* 56 Cal.4th at p. 1171.)

"Determining the validity of a *Miranda* rights waiver requires 'an evaluation of the defendant's state of mind' [citation] and 'inquiry into all the circumstances surrounding the interrogation' [citation]." (*People v. Nelson* (2012) 53 Cal.4th 367, 375 (*Nelson*).) "When a juvenile's waiver is at issue, consideration must be given to factors such as 'the juvenile's age, experience, education, background, and intelligence, and … whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.' [Citations.]" (*Ibid.*)

In reviewing *Miranda* issues on appeal, we accept the trial court's determination of disputed facts if supported by substantial evidence, and we independently decide whether the challenged statements were obtained in violation of *Miranda*. (*People v. Lessie* (2010) 47 Cal.4th 1152, 1169.)

Here, the trial court determined that, after Balasis advised Nash of her *Miranda* rights, Nash waived her rights and voluntarily answered the detectives' questions. Nash does not dispute this determination, which is supported by the record. Instead, Nash

contends that, *after* waiving her rights and voluntarily submitting to questioning, she invoked her right to silence when she said, "I want my sister. I don't want to do this anymore."

In *Nelson*, our Supreme Court specifically addressed how to determine whether a juvenile suspect has invoked her *Miranda* rights after initially waiving those rights. The court held, "[O]nce a juvenile suspect has made a valid waiver of the *Miranda* rights, any subsequent assertion of the right to counsel or right to silence during questioning must be articulated sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of such rights." (*Nelson, supra*, 53 Cal.4th at pp. 379–380.)

The court explained, "[A]fter a suspect makes a valid waiver of the *Miranda* rights, the need for effective law enforcement weighs in favor of a bright-line rule that allows officers to continue questioning unless the suspect clearly invokes the right to counsel or right to silence." (*Nelson, supra*, 53 Cal.4th at p. 377.) Therefore, after a suspect waives her *Miranda* rights, her subsequent invocation of those rights must be "unambiguous and unequivocal," and further, questioning officers have no duty to clarify ambiguous statements. (*Ibid*.; see *Davis v. United States* (1994) 512 U.S. 452, 459, 461.)

In *Nelson*, the defendant, who was 15 years old, was convicted of the murder of a 72-year-old neighbor and five counts of first degree burglary. On appeal, he challenged the admission of his statements made during a custodial interrogation. The defendant did not dispute that he initially waived his *Miranda* rights. He argued, however, that he invoked his *Miranda* rights postwaiver by asking several times to speak to his mother and by making certain other statements. (*Nelson, supra*, 53 Cal.4th at p. 371.)

During questioning, the defendant admitted he entered the victim's house and took jewelry and her purse, but he denied responsibility for her death. About three and one-half hours into the questioning, the investigators asked if he wanted to take a polygraph test, and he asked to call his mother. (*Nelson, supra*, 53 Cal.4th at p. 372.) The

investigators continued their questioning, and the defendant continued to answer. He made additional requests to call his mother and was allowed to call. He did not reach his mother, but he spoke to his grandmother and brother. At one point, the defendant "indicated he wanted the investigators to leave him alone." (*Id*. at p. 373.) At other points, he declined to take a polygraph test because his relatives had told him they did not want him to do anything until a lawyer or his mother arrived. Eventually, the defendant wrote a statement admitting he killed his neighbor by striking her with a hammer. (*Ibid*.)

The trial court denied the defendant's motion to exclude his statements. (*Nelson, supra,* 53 Cal.4th at p. 374.) It found that whenever the defendant asked to speak to his mother, he did so because he wanted to tell her what was going on and to ask her what he should do. The trial court also noted that, although he indicated he did not want to take a polygraph test without his mother or a lawyer, he "'continued to consent to voluntarily talk' to the authorities on other topics." (*Id*. at p. 381.) After reviewing the videotape and transcript of the interview, the Supreme Court concluded the trial court's ruling was both legally and factually supported. (*Id*. at pp. 381–382.)

The Supreme Court observed, "Although [the] defendant became increasingly upset during the interview, and quieter toward the end, the questioning properly continued because [the] defendant never communicated an intent to stop the interview altogether." (*Nelson, supra,* 53 Cal.4th at p. 382.) Even though the defendant said that his relatives "told him not to take a polygraph test 'until my mom or a lawyer is here,' and that those family members 'don't want me to do anything until a lawyer or my mom is here,'" the court determined that, taken in context, these statements were not an unambiguous request to stop all questioning. (*Ibid*.)

In addition, the court concluded the defendant "did not unambiguously assert his right to silence when he told the investigators … he did not care who might be caught for … murder, 'as long as you guys leave me alone.'" (*Nelson, supra,* 53 Cal.4th at p. 383.) This was because "[a] reasonable officer in the circumstances could view that statement

as an expression of frustration with the investigators' repeated refusal to accept his denial of guilt for the murder," rather than an invocation of the right to silence. (*Ibid*.) In reaching this conclusion, the court cited *People v. Williams* (2010) 49 Cal.4th 405 (*Williams*) and *People v. Jennings* (1988) 46 Cal.3d 963 (*Jennings*).

In *Williams*, an officer repeatedly asked the defendant about the murder victim, and the defendant repeatedly answered that he did not know her. The officer persisted, asking what the defendant did with the victim. The defendant responded, "'I don't want to talk about it.'" (*Williams, supra,* 49 Cal.4th at p. 433, italics omitted.) The Supreme Court held this was not an invocation of the right to remain silent. The court explained:

> "'A defendant has not invoked his or her right to silence when the defendant's statements were merely expressions of passing frustration or animosity toward the officers, or amounted only to a refusal to discuss a particular subject covered by the questioning.' [Citations.] In our view, the statement … —'I don't want to talk about it'—was an expression of [the] defendant's frustration with [the officer's] failure to accept [the] defendant's repeated insistence that he was not acquainted with the victim as proof that he had not encountered her on the night of the crime, rather than an unambiguous invocation of the right to remain silent. [Citations.] A reasonable officer could interpret [the] defendant's statement as comprising part of his denial of any knowledge concerning the crime or the victim, rather than an effort to terminate the interrogation. [Citation.]" (*Williams, supra,* 49 Cal.4th at p. 434.)

In *Jennings*, the defendant said to an officer during an interrogation: "'I'm not going to talk,'" and, "'You, nothing personal man, but I don't like you. You're scaring the living shit out of me.… That's it. I shut up.'" (*Jennings, supra,* 46 Cal.3d at p. 977, fn. omitted.) After reviewing a recording of the interrogation, the Supreme Court concluded the defendant's statements were not an invocation of the right to silence:

> "Viewing the tape, observing [the] defendant's demeanor before, during, and after the statements, and considering the context in which [the] defendant made the statements on which he relies here, we conclude that the statements reflect only momentary frustration and animosity toward [the questioning officer]. It is evident that [the] defendant believed [the officer] was misconstruing [the] defendant's statements and persisting in

> his attempt to get [the] defendant to recall details about his whereabouts [after he already said he could not recall] ….” (*Jennings*, *supra*, 46 Cal.3d at p. 978.)

Returning to our case, the trial court found no unambiguous invocation of rights until Nash asked for her lawyer. The court noted that, after requesting to see her sister, Nash voluntarily talked “right after that.” We have reviewed the videotape and transcript, and we agree with the trial court’s ruling. Nash’s request for her sister, like the defendant’s request for his mother in *Nelson*, was not a clear invocation of the right to remain silent or the right to counsel. Her statement, “I don’t want to do this anymore” was not an unambiguous invocation of the right to remain silent either. Viewed in context, a reasonable officer could understand that Nash was expressing momentary frustration because the detectives persisted in questioning her about her intent when she went into Session’s house, and they refused to accept her denial of any intent to steal. (See *Nelson*, *supra*, 53 Cal.4th at p. 383.) Her statement “I don’t want to do this anymore” could be construed as “I don’t want to lie anymore,” and, in fact, Nash did admit they were looking for an empty house to steal from soon afterwards. Alternatively, a reasonable officer could understand Nash’s statement together with her request for her sister to mean she wanted to confer with her sister to get their story straight. The possibility of more than one reasonable interpretation of Nash’s conduct bolsters our conclusion that, in context, Nash’s statement, “I don’t want to do this anymore,” was not an objectively unambiguous invocation of her *Miranda* rights.

Nash argues the trial court should have concluded her statement that she did not want to do this anymore “was *her way* of saying she wanted the interview to end.” (Italics added.) But Nash’s subjective intent is not relevant to the determination whether she made an unambiguous postwaiver invocation of the right to remain silent. (*Nelson*, *supra*, 53 Cal.4th at p. 377 [“suspect’s subjective desire” not relevant to determination whether suspect made clear postwaiver invocation of *Miranda* rights].) Further, as the trial court noted, Nash continued to talk to the detectives after making the statement that

she did not want to do this anymore, and she was able to invoke her *Miranda* rights clearly when she later said, "I want my lawyer." For these reasons, Nash's argument fails.

2. Nash's statements were not involuntary

Next, Nash claims the statements she made to the detectives after she said, "I don't want to do this anymore" were involuntary because the detectives used "trickery" to obtain her statements. Nash complains the detectives urged her to tell the truth "[e]ven if it might be a little bit bad" for her and that Balasis told her there was a difference between stealing and "want[ing] this thing to happen to this woman."

> "A minor has a Fifth Amendment privilege against self-incrimination, which precludes admission of a minor's confession obtained without the minor's voluntary, intelligent, and knowledgeable waiver of his or her constitutional rights. [Citations.] To determine whether a minor's confession is voluntary, a court must look at the totality of circumstances, including the minor's age, intelligence, education, experience, and capacity to understand the meaning and consequences of the given statement. [Citations.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 383.)

However, "'[t]he decision to confess cannot be of itself an indicium of involuntariness *in the complete absence of coercive circumstances*.' [Citation.]" (*Ibid*., italics added.) "A court should look at whether the minor 'was exposed to any form of coercion, threats, or promises of any kind, trickery or intimidation, or that he was questioned or prompted by … anyone else to change his mind.' [Citation.]" (*Ibid*., citing *In re Frank C.* (1982) 138 Cal.App.3d 708, 714 (*Frank C.*).)

We review "the evidence independently to determine whether a defendant's confession was voluntary, but will uphold the trial court's findings of the circumstances surrounding the confession if supported by substantial evidence." (*People v. Lewis*, *supra*, 26 Cal.4th at p. 383.)

Nash contends Balasis knew "he was maneuvering [her] into exposing herself to prosecution for first degree felony murder if he could get her to admit she knew [Moses]

was looking for houses to burglarize." Nash offers no authority for the proposition that seeking this kind of information constitutes coercion. Nor does she offer any support for her claim that urging her to tell the truth or stating that an intent to steal is different from an intent to kill amounts to trickery. Mere advice or exhortation by law enforcement to tell the truth, unaccompanied by any threat or a promise, does not render a subsequent confession involuntary. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 210.) Even deceptive comments do not necessarily render a suspect's statement involuntary. (*Williams*, *supra*, 49 Cal.4th at p. 443.) "'"The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable."' [Citation.]" (*Ibid.*) In our review of the videotape of the interview, we see no evidence that the circumstances of the interview or the detectives' conduct was coercive.

In her reply brief, Nash emphasizes she was crying when she stated she wanted her sister and she did not want to do this anymore. Viewed in context, however, this does not demonstrate her subsequent statements were coerced. Nash cried at early points in the interview as well, and each time—including after she said did not want to do this anymore—she was able to stop crying, compose herself, and continue to answer questions.

In *Frank C.*, the minor argued his confession was coerced because he was left in a detention room for an hour without food or drink, and this "constituted 'sufficient pressure to induce' him to give whatever information the officer desired." (*Frank C.*, *supra*, 138 Cal.App.3d at p. 713.) The appellate court rejected this argument as sheer speculation, given that the minor did not take the stand and offered no evidence regarding the voluntariness of his confession. (*Ibid.*) Similarly, in the present case, Nash did not testify she felt coerced, and no mental health expert offered any opinion that her statements were coerced. Accordingly, on the record before us, we reject Nash's

argument that her statements should have been suppressed because they were made involuntarily.

III. Special Circumstance Finding

The prosecution's theory was that Moses, Nash, and Angelique were guilty of first degree felony-murder because they all participated in a burglary during which Session was killed. (§ 189.) The prosecutor argued Moses was the actual killer, and Nash and Angelique were liable for felony murder because they aided and abetted the underlying burglary. The jury found Nash guilty of first degree murder.

The jury also found the burglary special circumstance true. (§ 190.2, subd. (a)(17)(G).) Because Nash was not the actual killer, to establish the special circumstance, the prosecution was required to prove she aided and abetted Moses in the burglary with reckless indifference to human life and as a major participant. (§ 190.2, subd. (d).)

The parties filed supplemental briefs addressing the special circumstance finding in light of the *Banks* decision, and Nash contends the special circumstance finding must be vacated because there was no substantial evidence she harbored the requisite state of mind of reckless indifference to human life or was a major participant.[26] We subsequently requested the parties file supplemental letter briefs addressing whether, under the California Supreme Court's recent decision in *Clark*, *supra*, 63 Cal.4th 522, there is substantial evidence supporting the jury's finding that Nash acted with "reckless indifference to human life." (§ 190.2, subd. (d).) We now reconsider our opinion through the lens of *Banks* and *Clark* and conclude these decisions compel reversal of the special circumstance finding on the ground the evidence is insufficient to support the

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[26]Nash did not originally challenge the jury's implied finding that she was a "major participant" in the underlying burglary. (§ 190.2, subd. (d).) She argued only there was insufficient evidence for the jury to find she acted with "reckless indifference to human life," claiming the evidence did not show she "subjectively appreciated" (*ibid.*) there was the possibility of grave danger to human life when she entered Mrs. Session's house believing that no one was home. Nash now advances both arguments.

jury's finding Nash was recklessly indifferent to human life. Given this conclusion, we do not reach the issue of whether she was a major participant. (*Clark, supra,* at p. 614.)

A. Standard of Review

In assessing a claim of insufficiency of the evidence, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.… A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*Ibid*.)

The same standard applies where the prosecution relies primarily on circumstantial evidence, and we accept any logical inferences the jury could have drawn from the circumstantial evidence. It is the jury, not the reviewing court, that must be convinced of the defendant's guilt beyond a reasonable doubt. (*People v. Zamudio, supra,* 43 Cal.4th at pp. 357–358.)

B. Applicable Law

For defendants who are 18 years old or older, the punishment for first degree murder is death, LWOP, or imprisonment in state prison for a term of 25 years to life. (§ 190, subd. (a).) The punishment for first degree murder where a special circumstance described in section 190.2, subdivision (a), is found true is either death or LWOP. (§ 190.2, subd. (b).)

The punishment for minors tried as adults is different. The death penalty cannot be imposed on any person who was under the age of 18 at the time of the commission of

the crime. (§ 190.5, subd. (a).) Further, LWOP cannot be imposed on any person who is under the age of 16 at the time of the commission of the crime. (§ 190.5, subd. (b); *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 17.) Instead, the greatest permissible punishment for a minor under 16 years of age who commits a first degree murder with a special circumstance is 25 years to life. (*Id.* at p. 17.)

Because Nash was under age 16 at the time of the murder, she was sentenced to a term of 25 years to life. A successful challenge to the special circumstance finding would not result in a reduction of her sentence because her remaining first degree murder conviction requires the same punishment of 25 years to life in prison. (§ 190, subd. (a); see *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754, fn. 4 (*Bustos*).) Nevertheless, we address the issue because, if her contention is correct, she "would be entitled to have the special circumstance stricken and be treated as an 'ordinary' first degree murderer." (*Id.* at p. 1754, fn. 4.)

"In order to support a finding of special circumstances murder, based on murder committed in the course of designated felonies, against an aider and abettor who is not the actual killer, the prosecution must show either that the aider and abettor had intent to kill (§ 190.2, subd. (c)) or acted with reckless indifference to human life while acting as a major participant in the underlying felony. (§ 190.2, subd. (d).)" (*Bustos*, *supra*, 23 Cal.App.4th at p. 1753.)

Section 190.2, subdivision (d)[27] "was added to existing capital sentencing law in 1990 as a result of the passage of the initiative measure Proposition 115, which, in

[27]Section 190.2, subdivision (d) provides, in full: "Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4."

relevant part, eliminated the former, judicially imposed requirement that a jury find intent to kill in order to sustain a felony-murder special-circumstance allegation against a defendant who was not the actual killer." (*People v. Estrada* (1995) 11 Cal.4th 568, 575 (*Estrada*).) The statutory phrases "reckless indifference to human life" and "major participant" are taken verbatim from the United States Supreme Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137, 158 and footnote 12 (*Tison*). "The incorporation of *Tison*'s rule into section 190.2[, subdivision](d)—in express terms—brought state capital sentencing law into conformity with prevailing Eighth Amendment doctrine." (*Estrada, supra,* at p. 575.)

In *Clark*, the California Supreme Court explained that "the actus reus for the felony-murder aider and abettor special circumstance requires more than simply being an aider and abettor of the underlying felony under section 31. The special circumstance requires that the defendant be a '"major participant"' in the underlying felony. [Citation.] Likewise, the mens rea requirement for the felony-murder aider and abettor special circumstance is different from that required for first degree felony murder. The special circumstance requires that the defendant have '"reckless indifference to human life."' [Citation.] (*Clark, supra,* 63 Cal.4th at p. 615.)

> "Because the elements are different, what is sufficient to establish the elements for an aider and abettor of first degree felony murder is not necessarily sufficient to establish the elements of the felony-murder aider and abettor special circumstance. In *Banks,* we rejected the argument that any defendant involved in a felony enumerated in the first degree felony-murder statute (§ 189) automatically exhibited reckless indifference to human life. [Citation.] We observed that, although the felonies listed in section 189 are those that the Legislature views as '"inherently dangerous,"' this did not collapse the differences between an analysis involving felony murder, on the one hand, and an analysis of reckless indifference to human life, on the other. [Citation.] As we concluded, '[w]hether a category of crimes is sufficiently dangerous to warrant felony-murder treatment, and whether an individual participant has acted with reckless indifference to human life, are different inquiries.'" (*Clark, supra,* 63 Cal.4th at p. 616.)

C. Analysis: Reckless Indifference to Human Life

"[T]he culpable mental state of 'reckless indifference to life' is one in which the defendant 'knowingly engag[es] in criminal activities known to carry a grave risk of death' [citation] …." (*Estrada*, *supra*, 11 Cal.4th at p. 577, citing *Tison*, *supra*, 481 U.S. at p. 157; accord, *Clark*, *supra*, 63 Cal.4th at p. 611; *Banks*, *supra*, 61 Cal.4th at p. 801.) "The defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create." (*Banks*, *supra*, at p. 801.) "[I]t encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Clark*, *supra*, at p. 617.)

Our Supreme Court has further explained that reckless indifference to human life "encompasses both subjective and objective elements. The subjective element is the defendant's conscious disregard of risks known to him or her. But recklessness is not determined merely by reference to a defendant's subjective feeling that he or she is engaging in risky activities. Rather, recklessness is also determined by an objective standard, namely what 'a law-abiding person would observe in the actor's situation.'" (*Clark*, *supra*, 63 Cal.4th at p. 617.) Thus, "although the presence of some degree of [the] defendant's subjective awareness of taking a risk is required, it is the jury's objective determination that ultimately determines recklessness." (*Id.* at p. 622.)

1. Background

a. *Tison* and *Enmund* decisions[28]

The United Supreme Court's decisions in *Tison* and *Enmund* were foundational to the decisions in *Banks* and *Clark*. *Enmund* preceded *Tison*, and our Supreme Court described the decision, which had been dismissed as irrelevant by the Court of Appeal in *Banks*, as inseparable from *Tison*. (*Banks*, *supra*, 61 Cal.4th at p. 806.) The *Tison*-

[28] *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*).

Enmund standard was imported to section 190.2 and, as a statutory matter, the "standard is 'applicable to *all* allegations of a felony-murder special circumstance, regardless of whether the People seek and exact the death penalty or a sentence of life without [the possibility of] parole.'" (*Banks*, *supra*, at p. 804.)

With the core constitutional principle that "punishment must accord with individual culpability" as the starting place (*Banks*, *supra*, 61 Cal.4th at p. 801; accord, *Tison*, *supra*, 481 U.S. at pp. 147–149; *Enmund*, *supra*, 458 U.S. at p. 788), the Supreme Court "described the range of felony-murder participants as a spectrum." (*Banks*, *supra*, at p. 800.) The *Enmund* case exemplifies one extreme end of this spectrum: a minor actor not on the scene who did not intend to kill anyone and lacked "'any culpable mental state.' [Citation.] At the other extreme were actual killers and those who attempted or intended to kill." (*Banks*, *supra*, at p. 800.) The *Tison* case exemplifies those cases in "the gray area in between" in which the actor was not the actual killer and did not attempt or intend to kill but was nonetheless a major participant who exhibited reckless indifference to human life and thus satisfies the culpable requirement. (*Banks*, *supra*, at p. 800.)

Given their foundational importance, we briefly summarize the facts underlying *Enmund* and *Tison* before considering *Banks* and *Clark*. At issue in *Enmund* was whether it was constitutional to impose the death penalty where the defendant did not kill the victims, did not attempt to kill the victims and did not intend the victims be killed. (*Enmund*, *supra*, 458 U.S. at p. 787.) In that case, an elderly couple was killed during the course of an armed robbery at their house. The defendant was the getaway driver who was waiting a few hundred feet away from the house. (*Id.* at pp. 786–788.) The court concluded the punishment was not constitutional and reversed the defendant's sentence because it had been imposed "in the absence of proof that [he] killed or attempted to kill, and regardless of whether [he] intended or contemplated that life would be taken …." (*Id.* at p. 801.)

In the *Tison* case, the court considered whether it was constitutional to impose the death penalty where neither of the defendants, two brothers, were the actual killers nor did they specifically intend the victims' deaths. (*Tison, supra*, 481 U.S. at p. 138.) The court rejected the minority position among courts that an intent to kill was required to support imposition of capital punishment, stating "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." (*Id.* at pp. 157–158.) The court held "that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Id.* at p. 158.)

The two Tison brothers, along with a third brother, entered a prison with an ice chest containing guns. (*Tison, supra*, 481 U.S. at p. 139.) Once inside, they armed their father and his cellmate, both convicted murderers, and all fled the prison. (*Ibid.*) Several days later, one brother flagged down a passing motorist after the group's car, a Lincoln, got a flat tire and they decided to steal a car. (*Id.* at pp. 139–140.) After the others emerged from hiding, the motorist and his family were forced into the Lincoln and driven into the desert by two of the brothers. (*Id.* at p. 140.) After transferring belongings from the disabled Lincoln to the motorist's car, one brother drove the Lincoln even farther into the desert at his father's direction. (*Ibid.*) The motorist begged not to be killed but after the brothers' father apparently considered the options, he and his cellmate killed the family of four. (*Id.* at pp. 140–141.) They all fled and several days later the group was stopped at a roadblock. (*Id.* at p. 141.) One brother was killed during the shootout with police, the father died of exposure after fleeing into the desert, and the two remaining brothers and the father's cellmate were brought to trial, convicted and sentenced. (*Ibid*.) The court found the facts "clearly support a finding that [the brothers] subjectively appreciated that their acts were likely to result in the taking of innocent life" (*id.* at p.

152) and described the brothers' participation in the crime as "'substantial'" (*id.* at p. 158).

Guided by *Enmund* and *Tison*, our Supreme Court articulated in *Banks* and *Clark* some of the factors relevant in determining whether a defendant is a major participant and acted with reckless indifference to human life, although it cautioned that no one factor is either necessary or necessarily sufficient. (*Clark*, *supra*, 63 Cal.4th at p. 618; *Banks*, *supra*, 61 Cal.4th at p. 803.) Our analysis of Nash's conduct in this case is informed by the facts underlying the decisions in *Banks* and *Clark* and, therefore, we briefly turn to the facts of those cases.

b. *Banks* decision

The *Banks* case involved the planned armed robbery of a medical marijuana dispensary. (*Banks*, *supra*, 61 Cal.4th at p. 795.) One of the victims, an armed security guard, was shot and killed during the robbers' escape. (*Id.* at pp. 795–796.) The court found the getaway driver, Lovie Troy Matthews, was not a major participant and did not act with reckless indifference to human life, and it reversed the jury's true special circumstance finding. (*Id.* at pp. 807, 811.)

Matthews was not at the scene of the armed robbery; after dropping his three confederates off to rob the dispensary, he waited three blocks away for 45 minutes before he received a phone call from one of them and picked them up. (*Banks*, *supra*, 61 Cal.4th at pp. 804–805.) There was no evidence Matthews had a role in planning the robbery, obtained the weapons, could see or hear the shooting, instigated the shooting or could have prevented the shooting. (*Id.* at p. 805.) There was also no evidence Matthews had previously committed any crimes of violence (*ibid.*); as to his three confederates, evidence of past acts of violence was nonexistent as to one and "so attenuated as to be essentially nonexistent" as to the other two (*id.* at p. 811); and there was no evidence he knew there would be a guard at the dispensary, let alone an armed guard (*ibid.*).

The court found "Matthews was, in short, no more than a getaway driver, guilty … of 'felony murder *simpliciter*' [citations] but nothing greater." (*Banks, supra*, 61 Cal.4th at p. 805.) The court concluded that "[b]ecause nothing in the record reflects that Matthews knew there would be a likelihood of resistance and the need to meet that resistance with lethal force, the evidence failed to show Matthews 'knowingly engag[ed] in criminal activities known to carry a grave risk of death.'" (*Id.* at p. 811.)

c. *Clark* decision

Approximately one year after the issuance of *Banks*, the California Supreme Court issued its decision in *Clark*. The defendant in that case was more than just a mere getaway driver; he masterminded and organized the after-hours armed robbery of a computer store, and he orchestrated the robbery itself from a car in the store's parking lot. (*Clark, supra*, 63 Cal.4th at pp. 612, 623.) The court concluded there, too, however, that the evidence was not sufficient to support the finding of special circumstance murder because "there appear[ed] to be nothing in the plan … that elevated the risk of human life beyond those risks inherent in any armed robbery."[29] (*Clark, supra*, at p. 623.)

The court considered the group knew there would still be employees present in the store at the planned time, although most would have left already. (*Clark, supra*, 63 Cal.4th at pp. 612–613, 620.) During the robbery, they handcuffed the employees who were present and left them in the bathroom, as planned. (*Id.* at pp. 536, 613, 620.) There was one weapon involved in the robbery, loaded with one bullet, although there was some evidence it was intended to be unloaded. (*Id.* at pp. 613, 619.) When one of the employee's mothers approached the store, apparently to find out what was taking her son so long to come out, her arrival caught one of the participants, Nokkuwa Ervin, off guard and he shot her in the head, killing her. (*Id.* at pp. 535, 537, 612–613.) At that time, the defendant was in a car in the store's parking lot and not in the immediate area of the

[29]The court discussed whether the defendant qualified as a major participant, but did not decide the issue. (*Clark, supra*, 63 Cal.4th at p. 614.)

shooting. (*Id.* at pp. 614, 619.) The court found no evidence the defendant directed Ervin to use lethal force, knew Ervin had a propensity for violence, had the opportunity to observe Ervin's response to the victim's arrival at the store, or could have intervened in time. (*Id.* at pp. 619, 621.)

2. Nash's culpability

Turning to the facts of this case, we focus on the evidence of Nash's culpability in Session's death, guided by the factors in *Clark*.[30] (*Clark*, *supra*, 63 Cal.4th at pp. 618–623.) Nash argues that under *Banks* and *Clark*, the evidence is insufficient as a matter of law to support the special circumstance finding. The Attorney General argues that, to the contrary, three of the five factors articulated in *Clark* apply in this case and, therefore, our prior determination that substantial evidence supports the jury's finding of special circumstances should not be disturbed. (*Clark*, *supra*, at pp. 618–623.)

As previously stated, our analysis of the factors articulated in *Clark* compels the conclusion that the special circumstance finding must be reversed.

a. Weapons

The first factor takes into consideration the presence and/or use of any weapons. In *Clark*, a case involving armed robbery, the court explained that "mere … awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to human life." (*Clark*, *supra*, 63 Cal.4th at p. 618.) However, bringing an arsenal of weapons into a prison and later guarding the victims with those weapons was viewed as a significant fact in *Tison*, as is "*use* of a firearm," even in the absence of intent to kill or evidence identifying which defendant killed the victim. (*Clark*, at p. 618.)

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[30] In *Banks*, the court identified some factors that distinguished the defendants in *Tison* from the defendant in *Enmund* and, thus, might be relevant in determining whether a defendant is a major participant in the crime. (*Banks*, *supra*, 61 Cal.4th at p. 803.) As we need not reach that issue, we do not repeat those factors here. We note, however, the court's recognition in *Clark* that there is a "'significant[] overlap'" between the elements of major participation and reckless indifference to human life. (*Clark*, *supra*, 63 Cal.4th at pp. 614–615.)

In this case, there is no evidence Nash, Moses or Angelique was armed with any weapons. Session was fatally injured by blows from Moses' fists. We emphasize this fact makes her death no less tragic or reprehensible. It does, however, distinguish this crime from those in which some or all of the participants arm themselves with weapons prior to or during the crime. (*Tison*, *supra*, 481 U.S. at p. 139; *Enmund*, *supra*, 458 U.S. at p. 784; *Clark*, *supra*, 63 Cal.4th at p. 618; *Banks*, *supra*, 61 Cal.4th at p. 803.) We therefore find no increase in Nash's culpability through the presence of any weapons.

b. Nash's presence and opportunity to restrain crime or aid victim

We next consider Nash's presence at the scene of the crime and any opportunity to restrain the crime from occurring or aid the victim once the crime occurred. We agree with the Attorney General that this factor is of the greatest weight in assessing Nash's culpability for Session's death, but we are not persuaded by the argument that the evidence supports a reasonable inference Nash saw Moses hit Session. As well, we reject Nash's argument that the evidence fails to show she saw Session after she was hit by Moses and it is improperly speculative for the jury to have concluded otherwise.

There is evidence Nash saw Session after Moses hit her and heard her ask for help, but Nash chose to flee rather than aid Session or summon help; she later admitted to Balasis that she should have called the police. There is insufficient evidence, however, that Nash saw Moses hit Session, and there is no evidence she had any opportunity to restrain Moses from hitting Session, either because she knew it was going to occur in advance or because she saw it as it was happening and could have intervened in time.

Thus, unlike the defendants in *Clark* and *Banks*, Nash was not at a distance from the scene of the crime and merely acting as the functional equivalent of a getaway driver. She was instead present in the house when Session was hit, but failed to render aid to or seek assistance for Session. We note Session's house was very small, there was only a very short distance between the kitchen where the phone was located and the dining room

where Session was found, and the view from the phone area in the kitchen to the spot where Session was found was unobscured.

Moreover, also unlike in *Clark*, the police were not arriving at the scene as Nash fled, from which she would have known help was imminent. (*Clark, supra*, 63 Cal.4th at p. 620.) Here, Nash had no idea when Session might be found and Session in fact lay on the floor of her house for up to two hours, approximately, before Masengale found her.

A reasonable trier of fact could therefore conclude Nash was in the position to either aid Session or seek help. She failed to do so and while her failure may have been attributable to panic, consideration of this factor increases her culpability.

c. Duration of felony

"The duration of the interaction between victims and perpetrators" is another consideration. (*Clark, supra*, 63 Cal.4th at p. 620.) We are unpersuaded by the Attorney General's argument that the duration of the felony increased Nash's culpability. This is not a case in which Session's death occurred "at the end of a prolonged period of restraint of the victim[] by defendant," giving the perpetrators time to consider their next steps and increasing the "'window of opportunity for violence.'" (*Ibid.*) As the Attorney General concedes, Moses' attack on Session was "swift." Nash, along with Moses and Angelique, was looking to burglarize an unoccupied home and was surprised by Session's presence. While precisely what unfolded in the house minute by minute is unclear, the crime did not unfold over a prolonged period of time; it was sudden and brief. Thus, there was insufficient evidence "to show that the duration of the felony under these circumstances supported the conclusion that [the] defendant exhibited reckless indifference to human life." (*Id.* at p. 621.)

d. Nash's knowledge of Moses' likelihood of killing

"A defendant's knowledge of factors bearing on a cohort's likelihood of killing [is also] significant to the analysis of reckless indifference to human life. [A d]efendant's knowledge of such factors may be evident before the felony or may occur during the

felony." (*Clark, supra,* 63 Cal.4th at p. 621.) In this case, there is no evidence Moses had a propensity for violence or that Nash was aware of any propensity for violence. The Attorney General does not argue otherwise and we find no increase in Nash's culpability under this factor.

e. Effort to minimize violence

Finally, in an issue of first impression, the California Supreme Court concluded "that a defendant's apparent efforts to minimize the risk of violence can be relevant to the reckless indifference to human life analysis. If the evidence supports an argument that [the] defendant engaged in efforts to minimize the risk of violence in the felony, [the] defendant may raise that argument and the appellate court shall consider it as being part of all the relevant circumstances that considered together go towards supporting or failing to support the jury's finding of reckless indifference to human life. But the existence of evidence that [the] defendant made some effort to minimize the risk of violence does not, in itself, necessarily foreclose a finding that [the] defendant acted with reckless indifference to human life, for the reasons set forth below concerning the two-part nature of the mens rea analysis for recklessness under *Tison* and section 190.2, subdivision (d)." (*Clark, supra,* 63 Cal.4th at p. 622.)

The Attorney General argues this factor points to Nash's increased culpability because she made no effort to minimize the risk of violence.

Nash, however, contends she took steps to minimize the risk. As she previously argued and we discussed in our now-vacated opinion, there is evidence defendants walked away from two houses where someone answered the door, and that she told Balasis she wanted to make sure no one was home before she went to the back of Session's house and the victim surprised her. This evidence supports the prosecution's theory that Nash and her codefendants intended to commit a burglary, as it suggests they were looking for an empty house from which to steal.

On the other hand, there is also evidence Nash knew someone was home when she entered Session's house. At one point, Nash told Balasis the victim answered the door and Nash asked to use the telephone, although she also stated the victim surprised her. Separately, Moses told Balasis he asked the victim if he could use the telephone, the victim let him in the house, and he only struck the victim because she looked scared and he thought she may have used her emergency pager. There was also evidence Masengale locked the back door at 3:15 p.m., but there was no indication of forced entry at the back door when Session was discovered shortly after 6:00 p.m. The jury could have inferred that Session answered the back door after not answering the front door and that she let Moses and Nash in to use the telephone. In that case, Nash and Moses would have been aware of Session's presence when they entered the house.

Whether Session surprised Nash at the back door prior to entry or after she had entered the house, however, her culpability in the burglary of what she had at one point anticipated was an empty house is neither greater than nor equivalent to that of the defendant in *Clark*. Even if he planned for the robbery to occur after the store closed and planned for the weapon to be unloaded, and even though evidence showed the weapon was loaded with only one bullet, the defendant in *Clark* nevertheless masterminded and orchestrated an armed robbery of a store knowing there would be some employees present, knowing there was the possibility that others might be present or interrupt, and knowing the plan required employees be overtaken and handcuffed. (*Clark, supra,* 63 Cal.4th at pp. 621–622.) Therefore, we find some effort to minimize the risk of violence occurred by virtue of the plan to target empty houses, unarmed.

3. Conclusion

Having reconsidered the evidence in this case in light of the recent decisions in *Banks* and *Clark*, we find the evidence insufficient to support the jury's finding of special circumstance murder. Nash's culpability for Session's murder at the hands of Moses rests in her failure to either aid Session or summon help for Session, despite being in the

house with Moses when he struck Session and seeing Session after she had been struck. (*Clark, supra*, 63 Cal.4th at p. 623.) Consideration of all the factors, and viewed in the context of the defendants' conduct in *Banks* and *Clark* found to be insufficient to support special circumstance murder, Nash's mere presence in the house and her flight from the scene after Session was injured is not sufficient to show she was "aware of and willingly involved in the violent manner in which the particular offense [was] committed, demonstrating reckless indifference to the significant risk of death … her actions create[d]." (*Banks*, supra, 61 Cal.4th at p. 801.) Session's death at Moses' hands was senseless and cruel, but Nash's *individual* culpability does not suffice to support the special circumstance finding. To conclude otherwise under the facts of this case would be to conflate special circumstance murder with the felony-murder rule.[31] (*Clark, supra*, at pp. 616–617, 623; *Banks*, *supra*, at p. 810.)

IV. Nash's Sentence

Nash was convicted of first degree murder with a burglary special circumstance—a conviction that would be punishable by LWOP or death if committed by an adult. (§ 190.2, subd. (a)(17)(G).) As we have explained, however, because Nash was under 16 years old at the time of the murder, the only statutorily authorized punishment for her

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[31]We relied on *People v. Smith* (2005) 135 Cal.App.4th 914, 927 (*Smith*), overruled on another ground as recognized in *People v. Garcia* (2008) 168 Cal.App.4th 261, 291–292, in our previous opinion. We need not weigh in on what the result in that case would be today under *Banks* and *Clark*; our role is to apply the California Supreme Court's more recent decisions to the evidence in this case. We note, however, the Court of Appeal's description of the attack and the defendant's role: "Even if Taffolla remained outside Star's room as a lookout, the jury could have found Taffolla gained a 'subjective awareness of a grave risk to human life' during the many tumultuous minutes it would have taken for Star to be stabbed and slashed 27 times, beaten repeatedly in the face with a steam iron, and had her head slammed *through* the wall. In addition, when Smith emerged from her room covered in enough blood to leave a trail from the motel to McFadden Street, Taffolla chose to flee rather than going to Star's aid or summoning help." (*Smith, supra*, at p. 927.) The court concluded that "[u]nlike the hypothetical 'non-major participant' in *Tison*[, *supra*,] 481 U.S. [at page] 158—who 'merely [sat] in a car away from the actual scene of the murders acting as the getaway driver to a robbery'—Taffolla stood sentry just outside Star's room, where the jury could infer he monitored and guarded the increasingly lengthy, loud, and violent attempted robbery-turned-murder." (*Id.* at p. 928.)

conviction was 25 years to life in prison and her successful challenge to the special circumstance finding does not result in a reduction of her sentence because her remaining first degree murder conviction requires the same punishment of 25 years to life in prison. (See §§ 190, subd. (a), 190.5, subd. (b); *Bustos*, *supra*, 23 Cal.App.4th at p. 1754, fn. 4.)

On appeal, Nash asserts that, because she was 15 years old at the time of the crime, the matter should be remanded to the trial court to determine whether she could benefit from treatment in juvenile court or should be placed on probation. She further contends the sentence she received of 25 years to life in prison violates the prohibition against cruel and unusual punishment.

A. Facts

After the joint trial on guilt began, Nash filed a motion to transfer her case to juvenile court. She argued that her prosecution in adult criminal court violated her due process and Eighth Amendment rights because (1) she would be deprived of treatment and rehabilitative opportunities, (2) her young age and lack of intent to kill could not be taken into consideration by the jury in deciding her guilt, (3) she would be subjected to a disproportionate punishment of 25 years to life in prison, (4) the trial court would have no discretion to impose a lesser term based on her individual characteristics, and (5) an adult criminal conviction would have far more severe and lifelong detrimental consequences than a juvenile adjudication would have.

The prosecution filed an opposition to the motion, which included a summary of Nash's record of poor conduct at school and in her foster care and group home placements. According to the opposition brief, in 2005, Nash was arrested for battery. In 2006, when Nash was 11 years old, she assaulted a staff member at her group home and was arrested for vandalism. In 2007, she was reported for beating another student on a school bus. School officials reported Nash was defiant and disrespectful. She was placed in group homes and often ran away. In 2009, she was arrested for assaulting two girls.

In November 2009, Nash absconded from her group home and her whereabouts were unknown at the time of her arrest in this case.

After the close of evidence but before the matter was submitted to the jury, the trial court heard the parties' arguments and denied Nash's motion to transfer her case to juvenile court. The court made the following findings:

> "That unfortunately [Nash] would not benefit, should she be convicted of the special circumstance felony murder, would not benefit from further rehabilitative efforts offered by the juvenile justice system due to increasingly violent—violations of the law by [Nash].
>
> "Second, we don't have a case …, a statute or binding authority that would stand for the proposition that a 25-to-life sentence is somehow unconstitutional under the Eighth Amendment.
>
> "And then should she be convicted in this case, I feel that the punishment of 25-to-life is fitting due to the brutal nature of the homicide to the poor 81-year-old defenseless lady in her own home, the circumstances of the crime, and her individual participation, certainly in my opinion, indicate that, should she be convicted, the appropriate sentence would be what the law requires, especially when you consider the goals of retribution, deterrence, and rehabilitation.
>
> "Unfortunately, efforts at rehabilitation and deterrence have not worked for [Nash]. She does have … the meaningful opportunity to obtain release, should she be convicted on a 25-to-life sentence, through the Parole Board based on what she would have to show, demonstrated maturity and rehabilitation. I do not feel at this time there has been any showing of demonstrated maturity and rehabilitation on her part, unfortunately."

On October 30, 2012, Nash moved for a new trial or verdict modification challenging the jury's true finding as to the special circumstance. She argued there was insufficient evidence she harbored reckless indifference to human life as no evidence showed she had reason to suspect Moses would kill anyone or that she aided and abetted his sudden and quick attack of Session.

On November 13, 2012, the court heard arguments on Nash's motion. Her attorney urged the court to consider her limited intellect in determining whether there was

sufficient evidence of the requisite mental state for the special circumstance finding. After hearing the parties' arguments, the court denied Nash's motion and moved on to sentencing.

A probation officer's report prepared for sentencing found Nash was unsuitable for probation and recommended a sentence of 25 years to life in prison. Nash provided a statement for the report. She denied committing the offense and said she and her sister did not know what was going to happen. Nash stated: "What [Moses] did was in his mind not ours. I think they made a mistake. I am innocent and always will be innocent." The probation officer concluded that Nash "still does not understand or take responsibility for her actions."

Nash's attorney asked the court to strike the probation officer's conclusion that Nash did not take responsibility for her actions. He argued Nash's statement was "unartful on the part of my 17-year-old client with a 76 IQ," but was correct in the sense that Nash and her sister did not know or have reason to know Moses would strike Session as he did. The prosecutor responded that Nash was aware she was involved in a burglary and her statement to the probation officer showed she was not taking responsibility. The court denied Nash's request to strike that portion of the report.

The court found no factors or circumstances in mitigation and found the following circumstances in aggravation:

> "[One,] the crime involved acts disclosing a high degree of cruelty, [viciousness], callousness in that the victim was pleading, begging for help and mercy during the incident. Two, the victim was particularly vulnerable in that she was 81 years of age and apparent to her in the sanctity and safety of her own home.…
>
> "Three, [Nash] was on juvenile probation when the instant crime was committed. Four, [Nash's] prior performance on juvenile probation was unsatisfactory in that she violated the terms. I find no factors in mitigation. Factors in aggravation clearly outweigh the absence of findings in mitigation."

The court found Nash was an unsuitable candidate for probation "due to [the] seriousness and violent nature of the offense." The court observed:

> "[W]hat also is very striking to the Court in listening to the evidence of the case that though she was youthful at the time of the offense and was aware what was happening in the home, absolutely no attempt was made to help the defenseless elderly victim. She still does not understand or take responsibility for her actions and her conduct demonstrates a significant danger to our community. [¶] And regretfully I have to find that a lengthy prison sentence is the only suitable disposition in this case."

The court imposed a term of 25 years to life in prison.

B. Analysis

1. Nash has not shown a violation of due process

In her first challenge to the sentence, Nash asserts that due process required the trial court to impose an individualized sentence. She contends, "[P]rinciples of fairness in punishing minors required the court to consider imposing an individualized disposition" for her. Nash requests we vacate her sentence and remand the matter to the trial court either "to determine whether [she] could have benefitted from treatment in juvenile court" or, alternatively, "for consideration whether [she] should have been placed on probation with terms and conditions suited to treatment and rehabilitation."

Nash begins her argument with a discussion of her motion to transfer her case to the juvenile court, which the trial court denied, and a description of juvenile court procedures. To the extent Nash intends to suggest her case should have been in juvenile court rather than in adult criminal court, she offers no authority to support this suggestion. As we have mentioned, the district attorney was permitted to try her as an adult because of the circumstances of the case (Welf. & Inst. Code, § 707, subd. (d)) and, on this record, we have no reason to conclude there was any error in the trial court denying her motion to transfer her case to juvenile court.

Nash next asserts a sentencing court must have options when sentencing a minor, citing "due process and Eighth Amendment considerations." (Some capitalization and

underlining omitted.) Nash relies on recent United States Supreme Court sentencing cases. In 2005, the United States Supreme Court held the death penalty is prohibited for offenders who were under 18 years old when they committed their crimes. (*Roper*, *supra*, 543 U.S. at p. 578.) Five years later, in *Graham*, *supra*, 560 U.S. at page 82, the court held, "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." Most recently, in 2012, the Supreme Court held that a mandatory sentencing scheme requiring minors convicted of homicide to be sentenced to LWOP, "regardless of their age and age-related characteristics and the nature of their crimes," violates the Eighth Amendment. (*Miller*, *supra*, 567 U.S. at p. 489.)

As the Attorney General argues, however, these cases do not apply to sentences that "leave the possibility of substantial life expectancy after prison," such as Nash's 25-years-to-life sentence. (*People v. Perez* (2013) 214 Cal.App.4th 49, 52 (*Perez*), rev. den., cert. den. *sub. nom. Perez v. California* (2013) ___ U.S. ___ [134 S.Ct. 527].) In *Graham*, the court indicated that a life sentence *with* the possibility of parole would be permissible even for a nonhomicide juvenile offender. (*Graham*, *supra*, 560 U.S. at p. 82 ["A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."].) In *Miller*, the court reasoned that, for minors, LWOP is akin to the death penalty, and, just as individualized sentencing is required in capital cases, individualized sentencing is required before LWOP may be imposed on a minor. (*Miller*, *supra*, 567 U.S. at pp. 474–480.) We do not read *Miller* as suggesting individualized sentencing, which is required in capital cases for adults and in LWOP cases for minors, is also required for minors when the sentence is 25 years to life in prison with the possibility of parole. (See *id*. at p. 474 [LWOP shares characteristics with the death penalty, which are not shared by any other sentences].)

The Court of Appeal reached a similar conclusion in *Perez*. In that case, the defendant was convicted of molesting two young boys when he was 16 years old. (*Perez*, *supra*, 214 Cal.App.4th at p. 51.) Under California's one strike law, his convictions required a sentence of two consecutive terms of 15 years to life in prison. (*Id*. at p. 58, citing § 667.61, subds. (b) & (i).) On appeal, the defendant argued the *Miller* line of cases implied California's one strike law was unconstitutional as applied to minors because it deprived trial courts of the discretion to take into account age. (*Perez*, *supra*, at p. 58.)

The Court of Appeal rejected the defendant's argument. After examining the major United States Supreme Court cases on sentencing minors and California cases applying *Miller*, the court summarized the law as follows:

> "There is a bright line between LWOP's and long sentences *with* eligibility for parole *if* there is some meaningful life expectancy left when the offender becomes eligible for parole. We are aware of—and have been cited to—no case which has used the [*Miller*] line of jurisprudence to strike down as cruel and unusual any sentence against anyone under the age of 18 where the perpetrator still has substantial life expectancy left at the time of eligibility for parole." (*Perez*, *supra*, 214 Cal.App.4th at p. 57, fn. omitted.)

The court noted the defendant in *Perez* would be eligible for parole when he reaches age 47. (*Id*. at p. 58.)

The *Perez* court concluded:

> "[T]his is not an LWOP case. The state's most severe penalties are not at stake here. So, essentially, [the defendant's] argument boils down to proposing a judicially imposed rule of mandatory discretion, namely that no matter how heinous the crime—*or how mild the penalty otherwise imposed on adults*—the federal and state cruel and unusual punishment clauses require states to hold out some possibility of discretionary reduction in *that* penalty to take into account an offender's youth.…
>
> "This seems to us a question properly addressed to the Legislature and we need only note that, at the moment at least, no high court has articulated a rule that *all* minors who commit adult crimes and who would

> otherwise be sentenced as adults *must* have the opportunity for some discretionary reduction in their sentence by the trial court to account for their youth." (*Perez*, *supra*, 214 Cal.App.4th at p. 59, fn. omitted.)

Following *Perez*, we reject Nash's position that the mandatory penalty of 25 years to life for felony murder violates due process or the Eighth Amendment as applied to minors. We observe Nash was arrested when she was 15 years old and, with credit for time served, she could become eligible for parole when she is 40 years old.

Nash also describes sentencing alternatives, suggesting the trial court could have ordered her placement in a diagnostic facility for observation and treatment pursuant to section 1203.03. But her attorney did not request such a placement during the sentencing hearing, and the Attorney General points out the trial court had no obligation to pursue this option. To the extent Nash argues otherwise, we see no abuse of discretion in the trial court not ordering a diagnostic placement. (See *People v. McNabb* (1991) 228 Cal.App.3d 462, 471.)[32]

2. Nash's sentence is not cruel and unusual punishment

In her second challenge to her sentence, Nash contends 25 years to life in state prison is cruel and unusual punishment as applied to her because of her youth, minimal culpability, mild mental retardation, psychological challenges, and her mental disorders. We disagree.

The Eighth Amendment of the United States Constitution prohibits infliction of "cruel and unusual punishments"; it applies to the states through the Fourteenth Amendment. (*Roper*, *supra*, 543 U.S. at p. 560.) Article I, section 17 of the California

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[32]Nash also mentions as sentencing alternatives the possibility of probation or imposing a lesser term because the mandated sentence is grossly disproportionate to her culpability. Nash notes the probation officer's report failed to mention her chaotic childhood or her psychiatric diagnoses and identified no mitigating circumstances. She also argues she did not touch the victim and she had a panicked reaction to Moses' assault on Session. These observations, however, do not demonstrate the trial court's decision to deny probation was an abuse of discretion. We address Nash's grossly disproportionate argument in our discussion of her challenge to her sentence as cruel and unusual punishment.

Constitution prohibits infliction of "[c]ruel or unusual" punishment. "The touchstone in each is gross disproportionality." (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82 (*Palafox*); see *Rummel v. Estelle* (1980) 445 U.S. 263, 271.) "Whether a punishment is cruel and/or unusual is a question of law subject to our independent review, but underlying disputed facts must be viewed in the light most favorable to the judgment." (*Palafox*, *supra*, at p. 82.)

"[A] punishment may violate the California constitutional prohibition [against cruel or unusual punishment], 'if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*), disapproved on another point in *People v. Chun* (2009) 45 Cal.4th 1172, 1185–1186.) To determine whether a punishment is cruel or unusual, courts "examine[] the nature of the offense and/or the offender, *with particular regard to the degree of danger both present to society*." (*In re Lynch* (1972) 8 Cal.3d 410, 425, italics added.) "Successful challenges based on the traditional *Lynch–Dillon* line [of cases] are extremely rare." (*Perez*, *supra*, 214 Cal.App.4th at p. 60; see *Rummel v. Estelle*, *supra*, 445 U.S. at p. 272 ["Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."].)

Here, the trial court found the nature of the crime involved "a high degree of cruelty, [viciousness], [and] callousness in that the victim was pleading, begging for help and mercy during the incident" and, "the victim was particularly vulnerable in that she was 81 years of age and … in the sanctity and safety of her own home." As to the nature of the offender, the court noted—in denying Nash's motion to transfer her case to juvenile court—that her conduct had become "increasingly violent" and the juvenile justice system would not benefit her. In imposing her sentence, the court observed Nash's performance on juvenile probation was unsatisfactory. Of great significance to the court, Nash "was aware what was happening in [Session's] home, [but] absolutely no

attempt was made to help the defenseless elderly victim." The court concluded "[Nash's] conduct demonstrates *a significant danger to our community*." (Italics added.) Given the circumstances of Session's murder in her own home, Nash's juvenile history, and the sentencer's express finding that Nash is a significant danger to the community, we cannot say the sentence of 25 years to life in state prison shocks the conscience.

Nash again cites *Miller*, *supra*, 567 U.S. 460, and *Roper*, *supra*, 543 U.S. 551, and argues she is less culpable for her crime because of her youth. We observe California's sentencing scheme has already reduced her potential punishment twice because of her age. First, even though she was convicted of a crime punishable by LWOP or death if committed by an adult, she could not receive the death penalty because she was under 18 years old when the crime was committed. (§§ 190.2, subd. (a)(17)(G), 190.5, subd. (a).) Second, she could not receive LWOP because she was under 16 years old when the crime was committed. (§ 190.5, subd. (b); *People v. Demirdjian*, *supra*, 144 Cal.App.4th at p. 17.)

Nash asserts she does not pose a danger to society because she is only responsible for Session's murder based on the felony-murder rule. We reject this assertion as it ignores both the facts underlying this senseless, callous crime and the trial court's observation that she represents a "significant danger to our community." Nash argues her state of mind reflected a lessened culpability because she cried and said she was sorry during her interview with the detectives. Again, this argument ignores the nature of the crime and the trial court's observation.

Nash also relies on *Dillon*, *supra*, 34 Cal.3d 441. In *Dillon*, the defendant was convicted of first degree felony murder, but our high court held his sentence of life imprisonment (as was required under former § 190 [as amended by Stats. 1976, ch. 1124, § 1]) was excessive under the facts of the case. (*Dillon*, *supra*, at pp. 487, 489.) The trial court in *Dillon* initially committed the defendant, who was 17 years old at the time of the offense, to the Youth Authority (now the Division of Juvenile Facilities). The trial court

gave three reasons for not sentencing the defendant to state prison: (1) the defendant's immaturity, "'emotionally, intellectually, and in a lot of other ways'"; (2) the court's belief the defendant was not dangerous; and (3) the fact this was the defendant's first offense. (*Id*. at p. 486.) In addition, the jury foreman submitted a letter to the court stating most or all of the jurors believed the defendant should be committed to the Youth Authority rather than sentenced to state prison. (*Id*. at p. 485.)

Subsequently, however, the People challenged the commitment order, and the Court of Appeal held the defendant was ineligible for commitment to the Youth Authority as a matter of law. The defendant was then sentenced to life imprisonment in state prison. (*Dillon, supra*, 34 Cal.3d at pp. 486–487.) Thus, the Supreme Court observed, the punishment "turned out to be far more severe than all parties expected." (*Id*. at p. 486.) In the circumstances of the case, the court held the sentence of life imprisonment was unconstitutional; the court reduced the defendant's murder conviction to second degree murder and remanded the matter for resentencing. (*Id*. at p. 489.)

The facts of *Dillon* are easily distinguished from Nash's case. Here, the trial court found Nash to be a significant danger to the community, and she had at least one prior juvenile adjudication as well as a history of violent confrontations.[33] Further, in *Dillon*, the jury and trial court apparently agreed that commitment to the Youth Authority would be the appropriate disposition for the defendant, but here, the trial court determined Nash would *not* benefit from further rehabilitative efforts offered by the juvenile justice system. In sum, we conclude this is not one of the "extremely rare" cases in which the punishment must be set aside because of gross disproportionality. (*Perez, supra*, 214 Cal.App.4th at p. 60.)

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[33]Nash argues her criminal history is explained by her mental deficiencies and emotional challenges, relying on Hoagland's testimony. But the trial court heard all the evidence presented at trial and determined Nash was a danger to the community. We cannot say this determination was made in error.

However, in light of the California Supreme Court's recent decision in *Franklin*, we shall remand this matter to the trial court to determine whether Nash had an "adequate opportunity at sentencing to make a record of mitigating evidence tied to [her] youth." (*Franklin, supra*, 63 Cal.4th at p. 269.) Although Nash's age was documented in the probation report and mentioned by the trial court, the trial court found no factors in mitigation. At the time of her sentencing in 2012, *Miller* had been decided but the legislation leading to the enactment of section 3051 and the amendment to section 4801 had not yet been proposed and, of course, *Franklin* had not been decided. (Sen. Bill No. 260 (2013–2014 Reg. Sess.) introduced Feb. 13, 2013.) As recognized by the court, "[t]he criteria for parole suitability set forth in … sections 3051 and 4801 contemplate that the [Board of Parole Hearing's] decisionmaking at [the defendant's] eventual parole hearing will be informed by youth-related factors, such as … cognitive ability, character, and social and family background at the time of the offense." (*Franklin, supra*, at p. 269.) Inasmuch as the parties and the trial court did not have the benefit of sections 3051 and 4801 or *Franklin* at the time of sentencing, it is appropriate to remand this matter for consideration of youth-related factors.

V. *Wheeler/Batson* Motion

Moses contends the trial court erred by denying his *Wheeler/Batson* motion. Nash joins in and adopts this contention. We conclude substantial evidence supports the trial court's findings.

A. Applicable Law

"Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race[, ethnicity,] or gender. [Citations.] Such a use of peremptories by the prosecution 'violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United

States Constitution.' [Citation.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 341 (*Bonilla*); see *People v. Trevino* (1985) 39 Cal.3d 667, 683 [Hispanics are cognizable group protected from discriminatory exclusion from jury service], disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219–1221, overruled in part on other grounds in *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1174.)

"There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination." (*Bonilla*, *supra*, 41 Cal.4th at p. 341.) When a defendant challenges the prosecution's peremptory strikes in a *Wheeler/Batson* motion, the trial court decides the motion using a three-step procedure. First, the defendant must make a prima facie case by showing that the totality of the circumstances gives rise to a reasonable inference of discriminatory purpose. Second, if the defendant makes a prima facie case of discriminatory purpose, the burden shifts to the prosecution to adequately explain its peremptory challenges by offering permissible group-neutral justifications for the strikes. Third, if such an explanation is offered, the trial court must decide whether the defendant has proven purposeful discrimination. (*Bonilla*, *supra*, at p. 341.)

"A prosecutor asked to explain his conduct must provide a '"clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' [Citation.] 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection. [Citation.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 613 (*Lenix*).)

"At the third stage of the *Wheeler*/*Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how

reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted.)

"Review of a trial court's denial of a *Wheeler*/*Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' [Citation.]" (*Lenix*, *supra*, 44 Cal.4th at pp. 613–614, fn. omitted.)

B. Facts

On August 31, 2012, Nash made a timely *Wheeler/Batson* motion and Moses and Angelique joined in the motion. The trial court noted for the record the existing panel of prospective jurors included two Hispanic men and three Hispanic women, one of whom appeared to the court to be part African-American.[34] The court then recounted that, over the course of three days, the prosecutor had used peremptory challenges to excuse the following ten panelists: A.O., P.H., S.G., G.B., J.S., P.L.M., M.G., P.B., P.P.M., and B.M.

[34]The parties do not state, and we have not been able to discern from the record, the ultimate composition of the jury.

Nash's attorney noted that four of the 10 panelists excused by the prosecution, G.B., J.S., M.G., and P.P.M., were Hispanic women, S.G. was a Hispanic man, and the remaining excused panelists were women. Moses' attorney argued the prosecutor's challenges "were systematic in that they were targeting females and minority females." He asked the court "to take into consideration that each of those individuals that were kicked [off] by [the prosecutor] have indicated that they would be fair and impartial, and there was nothing about their responses that would indicate otherwise." After the court asked about one of the excused panelists who was a mental health specialist (B.M.), Angelique's attorney noted a male nurse who worked in a nursing home remained on the panel.

The court found the defense had made a prima facie case, and the burden shifted to the prosecutor to explain the reasons for his peremptory challenges.

The prosecutor offered the following explanations:

> "As to Miss [M.], I removed her because we met with her individually. She indicated her son had been convicted and sent to prison for five years. When she came in and made the box, when she was asked if she'd had a bad experience with law enforcement, she said kind of, or she qualified and changed her statement slightly from what we had discussed with her individually. So based on that, I removed her. That qualification caused me concern since we had spoken to her individually.
>
> "Miss [G.] is a psychiatric nurse, and because the defense, for two defendants, is very reliant on psychiatric experts, I didn't want a hidden expert in the back. And for that reason, her closeness to the subject material, her knowledge of it, I didn't feel comfortable having her as a juror based on the defense I expect to be presented. [¶] … [¶]
>
> "Miss [M.], there was a little bit of the psych issue on her, but the big issue on her is she was on a hung jury. My practice has always been to remove jurors with prior jury experience of a hung jury. The question in my mind is are they going to be able to in a group setting—and granted the defense doesn't have to worry about this issue, but I do. I have to convince all 12. And I am also—in addition to looking at individuals, I'm looking at a group composition. Individuals who have been on hung juries, in my opinion, strike me as individuals who kind of had that experience before

and for one reason or another didn't rise to the challenge, so to speak, at least in a group setting.

"The other part of that actually came from [Angelique's attorney's] questioning in that he asked what she learned from it. She learned that people can be swayed. That's not necessarily indicative of the kind of juror I'm looking for. But also that she would hold her ground. And that can go both ways, but either way it causes me concern. So that's Miss [M.]

"As to Miss [B.], the sole issue on her was— [¶] … [¶] She's not Hispanic, but a female. I removed her because her answer was qualitatively different from every other juror when I asked about juveniles being charged as adults. She had reservations. And because of the amount of peremptories I had, I elected not to take that risk.

"Every other juror I've questioned who's remained and has been accepted, with the exception of one who we excused for cause during individual voir dire, has indicated they have no issue or strong opinions about that. She did, and so in the abundance of caution I removed her.

"[B.M.] was the same issue I had with Miss [G.], too close to the psychological stuff, and also substance abuse. One of the main defenses, especially as to [Moses], is that somehow he was intoxicated or under the influence of something or another. My impression—or my thoughts on her was just too close and too much of a possible hidden expert in the back. So that's why I removed her.

"Miss [S.] was on a hung jury and it was 6–6. Granted, it was a [section] 288, but still, same comments I made earlier. Jurors—I'm looking for a group of 12 who can come to a unanimous verdict, so a hung juror just doesn't do it for me.

"Miss [B.] was also on a hung jury and indicated she was in the minority. A lot of times I go on the assumption—and I recognize this is an assumption—that when it's in the minority, that she was in the minority for the defense. I recognize that [it's] also possible she was in the minority for the People. But in either event, she was on a hung jury and on a relatively simple case, so that causes me concerns as far as being on a case this complicated … she causes me the concerns that I—comments I've made regarding others who have been on hung juries.

"Miss [H.] was the custodian from Tehachapi. I removed her simply because her interactions with defense counsel was much more friendly, much more open. She smiled, she laughed, a variety of more personal interactions. When I questioned her it was very cold. It was very short

> answers, very curt, was the impression I got from her. I, in fact, tried to ask her what are your feelings about being here, are you excited to be here, you disappointed to be here, and still very nonresponsive with me. So I removed her for that reason.
>
> "And the last female is Miss [O.] She indicated she was unemployed and was involved in food prep. If memory serves, she was 18, 19 years old, very young, and was unemployed. I just didn't feel for a complicated murder case with multiple theories, three defendants, mental health defenses, I didn't feel she had sufficient life experience that I felt comfortable leaving her as a juror."

The court asked the prosecutor about comparative analysis with the prospective jurors on the panel. The prosecutor responded that there was a nurse, C.C., on the panel, but C.C. indicated he had no experience with psychology. The prosecutor reiterated his concern was with prospective jurors involved with mental health issues. He also noted two of the remaining panelists had served on juries, but they had reached verdicts.

The court then denied defendants' motion, stating: "Based on what I've heard from the totality of the record and the evidence, find that the prosecutor has adequately explained the racial-exclusion allegation by offering permissible race-neutral justifications to the exercise of the peremptory challenges as to the Hispanic and non-Hispanic women on the panel. [¶] And further find that there was subjective genuineness of the race-neutral reasons given for the exercise of the challenges. And further find that the prosecutor's race-neutral explanations given as to the exercise of each challenge is credible and, from my perspective, sincere and genuine. [¶] Respectfully deny the *Wheeler-Batson* motion."

C. Analysis

Moses questions the prosecutor's stated reasons for excusing the nine female panelists.[35] He argues the explanations were not plausible and therefore suggest the

[35]In responding to the motion, the prosecutor did not offer a reason for excusing S.G., a Hispanic man, and neither the trial court nor the defense attorneys followed up with a request for an explanation regarding S.G. On appeal, Moses does not argue the prosecutor excused S.G. based on improper motive. Accordingly, Moses has waived any challenge to the excusal of S.G.

prosecutor's real reason for excusing the panelists was improper discrimination. We conclude the record contains substantial evidence to support the trial court's findings.

1. P.L.M.

As to P.L.M., the prosecutor told the court:

> "I removed her because we met with her individually. She indicated her son had been convicted and sent to prison for five years. When she came in and made the box, when she was asked if she'd had a bad experience with law enforcement, she said kind of, or she qualified and changed her statement slightly from what we had discussed with her individually. So based on that, I removed her. That qualification caused me concern since we had spoken to her individually."

The record indicates that, for the first two days of jury selection, the court and attorneys questioned panelists individually and privately on preliminary questions regarding hardship, knowledge of the case or witnesses, and other reasons they might be excused from jury service.[36] This is the questioning the prosecutor referred to as when "we met with [P.L.M.] individually." On the third day, after the venire had been screened in this manner, 12 randomly selected panelists were seated in the jury box and questioned while the remaining panelists sat in the audience. This was the questioning the prosecutor described as "[w]hen she came in and made the box."

During her individual questioning, P.L.M. stated her son had been convicted of felony drunk driving and felony child endangerment and was sentenced to five years four months in prison. The court asked if she "ha[d] a chip on [her] shoulders in regard to the

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[36]The court gave the panelists six questions and then spoke individually to those who answered yes to at least one question. The questions were: (1) "do you have any knowledge of the facts or of any pretrial publicity or do you know any of the parties, witnesses, or attorneys?"; (2) "is there anything about the nature of the case or crimes charged that would affect your ability to be a fair and impartial juror?"; (3) "Has your life or that of someone close to you been touched or affected by a crime of violence or a crime similar to what's alleged in this case?"; (4) "is there any reason you feel you can't serve, such as an extreme financial, medical, or vacation hardship?"; (5) "is there any reason that you feel that you couldn't be a fair and impartial juror in this case?"; (6) "any legitimate reason, from your perspective, that you feel would prevent you from serving?"

District Attorney's Office for prosecuting him." She responded, "No, *not really*." (Italics added.) The court asked her what she meant by "not really," and she stated, "Not really, because he was drunk and he was driving and he had his kids in his car, so—." P.L.M. said she could decide the case solely on the evidence and the law. The prosecutor asked if there were anything about her son's case she thought was not fair. She responded her son should have had a more prepared public defender. However, she concluded, "I don't have any problem with the system punishing him for the choice that he made that day."

Later, when P.L.M. was seated in the jury box with other potential jurors, the court asked her, "Have you ever had a less-than-pleasurable experience with law enforcement?" She replied, "We kind of touched on that, but no, *not really*." (Italics added.) The questioning continued:

> "Q. Okay. Would any experience you've had with law enforcement in the less-than-pleasurable category cause you to have any feeling of bias or prejudice in regard to peace officers that might testify—
>
> "A. No.
>
> "Q. —the court, or the prosecutor?
>
> "A. No."

Moses argues that, contrary to the prosecutor's statement, P.L.M. never "qualified and changed her statement" and instead her responses were entirely consistent. As the Attorney General points out, however, P.L.M. did qualify her response ("not really") when questioned about her feelings toward law enforcement, but she did so *both* during the individual questioning and in the subsequent voir dire in open court. Thus, the record supports the prosecutor's explanation that P.L.M. qualified her response, although the record shows he may have been incorrect about whether the qualification was a change from her response during the individual questioning.

The Attorney General suggests the prosecutor may have "combined these responses" in his mind, but argues his concern about P.L.M.'s feelings toward law enforcement was legitimate. We agree. The California Supreme Court has "'repeatedly upheld peremptory challenges made on the basis of a prospective juror's negative experience with law enforcement.'" (*Lenix*, *supra*, 44 Cal.4th at p. 628; *Bonilla*, *supra*, 41 Cal.4th at p. 343 [felony conviction of spouse or relative recognized as race-neutral reason for excusing prospective jurors].) P.L.M.'s qualified response regarding her experience with law enforcement and the fact her son was serving time in prison for a felony are substantial evidence supporting the trial court's finding the prosecutor's stated reason for excusing P.L.M. was credible and genuine. Moses offers no evidence indicating the prosecutor's concern about P.L.M. was not sincere or was pretext for discrimination against female jurors. Accordingly, we will not disturb the trial court's finding as to P.L.M.

2. M.G. and B.M.

The prosecutor explained he excused M.G., a psychiatric nurse, and B.M., whom he described as "too close to the psychological stuff, and also substance abuse," because he did not want a "hidden expert" on the jury. These were valid reasons to excuse M.G. and B.M. (See *People v. Clark* (2011) 52 Cal.4th 856, 907 [fact that potential juror had taken college courses in psychology was race-neutral reason to excuse her; as to another prospective juror who was an administrative law judge, prosecutor could reasonably believe she might exert undue influence during deliberative process].)

The record confirms M.G. stated she was a nurse with a specialty in psychiatry and B.M. reported she was a mental health recovery specialist managing the cases of clients who have a "mental health diagnosis with substance abuse." This is substantial evidence to support the prosecutor's explanation and the trial court's finding the prosecutor's explanation was credible and genuine.

Moses challenges the prosecutor's explanation for excusing M.G. by minimizing her experience and knowledge in the mental health field. However, the fact "the only training [M.G.] had in this field was that obtained in nursing school" does not tend to show the prosecutor's concern about her expertise was implausible, disingenuous, or pretext for discrimination.

Moses also compares M.G. with impaneled jurors. He notes Juror No. 2749474 was a nurse and Juror No. 2840883 was a special education teacher who worked with severely disabled youths. Although Juror No. 2749474 was a registered nurse, she worked in the intensive care unit and then in case management, not in psychiatry. Juror No. 2840883 stated she worked with children in wheelchairs, many of whom have cerebral palsy. She reported the only time she interacted with psychologists is when a school psychologist is needed for an evaluation. The work and experience of these jurors was not so similar to M.G.'s as to put into question the prosecutor's explanation for excusing M.G. M.G.'s work in outpatient psychiatry involved handling telephone calls from individuals who "may be in crises" and, among her duties, she would "alert a physician or law enforcement if maybe the person's suicidal." M.G.'s day-to-day work involved mental health issues; the work of the impaneled jurors did not. Consequently, Moses' comparative juror analysis is not persuasive. (See *Lenix, supra*, 44 Cal.4th at p. 630.)

3. P.P.M., J.S., and G.B.

The prosecutor said he excused P.P.M., J.S., and G.B. because each had served on a jury that did not reach a verdict. Moses claims this explanation is "spurious" and argues the fact the panelists being on hung juries says nothing about their personal ability to deliberate fairly and impartially and is not predicative of how they might vote on this matter. This argument is unavailing.

"'The proper focus of a *Batson*/*Wheeler* inquiry, of course, is on the subjective *genuineness* of the [group]-neutral reasons given for the peremptory challenge, *not* on the

objective *reasonableness* of those reasons.' [Citation.]" (*People v. Chism* (2014) 58 Cal.4th 1266, 1317.) A prosecutor's reason may be "arbitrary or idiosyncratic" so long as it does not deny equal protection. (*Lenix*, *supra*, 44 Cal.4th at p. 613.) Here, the prosecutor explained it was his practice to remove jurors with prior experience on a hung jury. The genuineness of this explanation is supported by the fact he excused at least three panelists who had served on juries not reaching a verdict. When the motion was argued, the prosecutor pointed out the remaining panelists in the jury box who had prior jury experience had served on juries reaching verdicts. The trial court found the prosecutor's explanations credible, and we discern no grounds for setting aside this finding. We note Moses does not claim any of the impaneled jurors served on hung juries.

Moreover, our Supreme Court has recognized that prior jury service on a hung jury may be a valid reason to excuse a potential juror "[s]ince one who has had such an experience 'constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict' [citation] …." (*People v. Farnam* (2002) 28 Cal.4th 107, 138.)

4. P.B.

The prosecutor stated he excused P.B. because "her answer was qualitatively different from every other juror" with respect to trying juveniles as adults. "She had reservations." During voir dire in open court, the prosecutor questioned P.B. as follows:

> "Q. Do you have any strong opinions about juveniles being charged as adults?
>
> "A. To be honest, no, I believe that's fine. I just have a problem with—well, it's not our duty to [do] the sentencing. I have a problem with them being [housed] with adults at a young age.
>
> "Q. Okay.
>
> "A. I don't know how it works. I don't understand being tried as an adult, if that means—you know, I just don't feel—or their IQ I believe

has a—also a—I believe that they know—if they know what they're doing, but I don't believe they should be involved with adults.

"Q. Okay. Do you think that—well, do you think you're going to lend more credence to a defense argument automatically that they're just not smart enough, they just don't understand?

"A. No, that would not affect my opinion or the evidence that I've looked at."

On appeal, Moses accuses the prosecutor of misrepresenting the record because, while P.B. "might have believed, for whatever reason, juveniles should not be 'involved with adults,' she never expressed any reservations about a juvenile being tried as an adult …." We disagree with Moses' reading of the record. It appears to us P.B.'s answers easily could be understood as showing concern or reservations about treating juveniles as adults in the criminal justice system. This is a valid, nondiscriminatory reason to excuse a potential juror. (Cf. *People v. Stanley* (2006) 39 Cal.4th 913, 939–940 [prosecutor's perception potential juror harbored "'sympathy for the defendant'" was race-neutral reason for peremptory excusal]; *People v. Ledesma* (2006) 39 Cal.4th 641, 677–678 [potential juror's expression of uncertainty whether she could vote to impose death penalty was valid reason to exercise peremptory challenge, even if insufficient to justify challenge for cause].) The record provides substantial evidence supporting the prosecutor's explanation and the trial court's finding that the prosecutor's explanation was credible and genuine.

5. P.H.

The prosecutor's stated reason for excusing P.H. was that "her interactions with defense counsel was much more friendly, much more open." He observed she smiled and laughed with them, while she seemed more "cold" with him and her answers were "very curt."

"A prospective juror may be excused based upon facial expressions, gestures, [or] hunches" (*Lenix*, *supra*, 44 Cal.4th at p. 613), and Moses does not dispute a panelist's

friendlier interactions with defense counsel could be a valid reason to excuse the panelist. Instead, he argues the prosecutor's proffered excuse "is not supported by the record." The record, however, cannot convey whether P.H. smiled or laughed with defense counsel or appeared cold to the prosecutor. We have reviewed the reporter's transcript of the questioning of P.H., and nothing indicates the prosecutor's stated reason for excusing her is untrue. The trial court assessed the prosecutor's credibility, "draw[ing] upon its contemporaneous observations of the voir dire" (*ibid.*), and found the prosecutor to be credible and sincere. We will not disturb this finding.

6. A.O.

As to A.O., the prosecutor observed she was 18 or 19 years old and unemployed. He told the court, "I just didn't feel for a complicated murder case with multiple theories, three defendants, mental health defenses, I didn't feel she had sufficient life experience that I felt comfortable leaving her as a juror."

Moses agrees the record supports the prosecutor's description of A.O., and he does not dispute that youth and lack of life experience are legitimate reasons to excuse a prospective juror. He merely points out Juror No. 2776999 had recently graduated from college with an associate's degree in merchandise marketing, "suggesting she similarly was young and had little life experience." However, the record does not affirmatively show Juror No. 2776999 was a teenager like A.O., although it does show she had lived in Los Angeles, graduated from college, and was currently employed. This comparative juror analysis does not suggest the prosecutor's explanation for excusing A.O. was disingenuous or pretext for discrimination. We also note Juror No. 2776999 and A.O. are both women and Moses does not claim A.O. is Hispanic and, therefore, the comparative juror analysis would not be particularly relevant even if Juror No. 2776999 and A.O. were more similarly situated.

Given that Moses acknowledges A.O. was young and unemployed, we have no reason to disturb the trial court's finding that the prosecutor's explanation for excusing her was credible and sincere.

VI. Moses' Sentence

Moses' conviction for first degree special circumstance murder is punishable by LWOP or death if committed by an adult. (§ 190.2, subd. (a)(17)(G).) Because he was 17 years old when he committed the offense, Moses was not subject to the death penalty, and the potential penalties were LWOP or a term of 25 years to life. (§ 190.5, subds. (a), (b).)[37]

Moses contends a sentence of LWOP for a minor constitutes cruel and unusual punishment. Alternatively, he argues the trial court abused its discretion by imposing LWOP instead of 25 years to life in prison.

A. Facts

Probation officer Tabitha Raber prepared a report for Moses' sentencing hearing. Moses had a prior juvenile adjudication in June 2005 for battery and indecent exposure, and he was found in violation of probation twice. He admitted culpability for the murder but did not submit a written statement. Raber recommended a sentence of LWOP. She identified no circumstances in mitigation. In her analysis, Raber wrote:

> "The term prescribed by law for murder with special circumstances is … [LWOP]. *The presumptive sentence is Life without parole*; however, in circumstances where the defendant is 16 or 17 at the time of the offense, the Court has the discretion to impose an indeterminate sentence of 25 years to Life if they feel the defendant fits certain criteria such as immaturity, lacking in family support and/or upbringing and mental

[37]Section 190.5, subdivision (b), provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

> deficiencies. When considering the appropriate disposition in this matter, all facts were considered. It is recognized [Moses] was a ward of the Court and placed in numerous group homes during his childhood. Additionally, [Moses] indicates he suffers from Attention Deficit Disorder and other mental health issues.
>
> "However, all of these considerations can not overcome the viciousness and callous nature of the crime. The victim of this crime was extremely vulnerable based on her advanced age. What makes a further justification for a sentence of [LWOP] is the fact [Moses] knew his actions were wrong during the crime as he dragged the victim into another room to avoid being caught in the act. Furthermore, both [Moses and Nash] admit they heard the victim pleading for mercy; however, [Moses] continued to strike the victim ultimately causing her death. When all of these factors are evaluated and weighed, it is felt the appropriate sentence is [LWOP]." (Italics added.)

At the sentencing hearing on October 25, 2012, his attorney asked the court to give Moses "hope" by giving him the possibility of parole. He stated Moses had a "tragic upbringing" with physical, emotional, and verbal abuse growing up, and he had a low IQ and various disorders. Moses' attorney cited *Miller* and *Graham* and argued the cases show "the importance of realizing that we're dealing with juveniles, and juveniles are not as developed as adults."

The trial court stated, "Section 190.5, subdivision (b) differs from the mandatory schemes that are found unconstitutional in *Miller* because it gives the court the discretion to impose a term that affords the possibility of parole in lieu of an LWOP sentence. And that's what we're doing here today. [¶] … [¶] We're trying to weigh the various factors."

The prosecutor urged the court to impose LWOP. He stated Moses had molested his cousin. He argued Moses showed no concern about Session and he also did not care about how the murder impacted Session's family. He noted Masengale, who found Session after she had been beaten, had PTSD from the experience. The prosecutor argued Moses demonstrated "an utter lack of remorse or concern" at trial, and asserted, "The horror and magnitude of this crime demands [LWOP], his lack of concern."

The trial court imposed LWOP. In doing so, the court cited a very recent Court of Appeal case, *People v. Gutierrez*.[38] The court stated the case was similar "in the horrific nature of the crime that was committed"—a minor stabbed his aunt 28 times and attempted to sexually assault her. The court described the appellate case: "[I]t's provided in that case that the sentencing statute for 16- or 17-year-olds convicted of special circumstance murder requires a proper exercise of discretion in choosing *whether to grant leniency* and impose a lesser penalty of 25 years to life, which, of necessity, involves an assessment of what, in logic, would mitigate or not mitigate the crime." (Italics added.)

The court then described the "extremely brutal, savage, and cowardly beating" of Session, and the pathologist's testimony of Session's injuries. The court considered Middleton's psychological evaluation of Moses. It noted there was no evidence of mental retardation and Moses had attention deficit disorder and "impulsive control disorder, explosive temper, and assaultive and violent conduct, and prior reports of that." The court further explained:

> "I've thought long and hard about what punishment would be appropriate, and I'm absolutely convinced at this stage that [LWOP] is the only thing this Court can do that would redress the amount of violence that was inflicted on Miss Session.
>
> "There's been no showing that there is a categorical ban of LWOP sentences for juveniles that's required under the Eighth Amendment.
>
> "We have in this case determined that the amount of violence that was inflicted … is totally inexplicable. There's been, as the prosecutor points out, a devastation to her family, her children. No amount of time could be imposed as a punishment that would repay the damages caused, not only to the family, but those close around her.

[38]The California Supreme Court later granted review and the appellate decision was superseded by *Gutierrez*, *supra*, 58 Cal.4th 1354.

> "And, as I say, I am aware and I have weighed the factors, exercised discretion, and I feel that *it would be inappropriate to impose the more lenient possible sentence*." (Italics added.)

The court went on to find no circumstances in mitigation and the following aggravating circumstances: (1) the crime involved "a high degree of cruelty, viciousness, and callousness," (2) the victim was particularly vulnerable, (3) Moses was on juvenile probation when the crime was committed, and (4) his performance on juvenile probation was unsatisfactory.

B. Analysis

1. The prohibition against cruel and/or unusual punishment does not categorically ban LWOP for minors convicted of murder

Moses' first contention is that the imposition of LWOP on a juvenile offender is prohibited as cruel and unusual punishment. After the parties completed briefing in this appeal, however, this court "reject[ed] the notion … an LWOP term cannot properly be imposed under California law or the Eighth Amendment." (*Palafox*, *supra*, 231 Cal.App.4th at p. 90.) In doing so, we observed the California Supreme Court had implicitly rejected this contention in *Gutierrez*, *supra*, 58 Cal.4th 1354, by remanding two cases for resentencing under section 190.5, subdivision (b). (*Palafox*, *supra*, at p. 90.) Similarly, the United States Supreme Court has not foreclosed the possibility of imposing LWOP for a minor convicted of a homicide. (*Miller*, *supra*, 567 U.S. at pp. 482–483.) Following *Palafox*, we reject Moses' first contention.

***2. The matter must be remanded for resentencing under* Gutierrez**

Next, Moses argues the trial court abused its discretion by imposing LWOP instead of 25 years to life in prison. We will remand the matter for resentencing because, at the time of sentencing, the trial court did not have the benefit of *Gutierrez*, *supra*, 58 Cal.4th 1354, in which our high court construed section 190.5 in light of *Miller*, *supra*, 567 U.S. 460.

In *Gutierrez*, the court recognized section 190.5, subdivision (b) had long been understood as establishing a presumption in favor of LWOP for juveniles convicted of special circumstance murder. (*Gutierrez, supra*, 58 Cal.4th at p. 1369.) Given *Miller*'s reasoning, however, "a sentence of life without parole under section 190.5(b) would raise serious constitutional concerns if it were imposed pursuant to a statutory presumption in favor of such punishment." (*Gutierrez*, at p. 1379.) Instead, the court held that section 190.5, subdivision (b) confers discretion on a sentencing court to impose LWOP or 25 years to life with *no* presumption in favor of LWOP. (*Gutierrez*, at p. 1387.)

In addition, based on the discussion in *Miller*, the *Gutierrez* court held a sentencing court is required to consider the following:

> "First, a court must consider a juvenile offender's 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.' [Citations.] *Miller* observed that '"developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,"' and that 'those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "'deficiencies will be reformed.'"' [Citations.] …
>
> "Second, a sentencing court must consider any evidence or other information in the record regarding 'the family and home environment that surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional.' [Citation.] Relevant 'environmental vulnerabilities' include evidence of childhood abuse or neglect, familial drug or alcohol abuse, lack of adequate parenting or education, prior exposure to violence, and susceptibility to psychological damage or emotional disturbance. [Citation.]
>
> "Third, a court must consider any evidence or other information in the record regarding 'the circumstances of the homicide offense, including the extent of [the juvenile defendant's] participation in the conduct and the way familial and peer pressures may have affected him.' [Citations.] Also relevant is whether substance abuse played a role in the juvenile offender's commission of the crime. [Citation.]

> "Fourth, a court must consider any evidence or other information in the record as to whether the offender 'might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.]' [Citation.]
>
> "Finally, a sentencing court must consider any evidence or other information in the record bearing on 'the possibility of rehabilitation.' [Citations.] The extent or absence of 'past criminal history' is relevant here. [Citation.]" (*Gutierrez, supra,* 58 Cal.4th at pp. 1388–1389.)

Gutierrez involved the consolidated appeals of two 17-year-old offenders, each convicted of special circumstances murder and sentenced to LWOP. (*Gutierrez, supra,* 58 Cal.4th at p. 1360.) The Supreme Court remanded both cases for resentencing, concluding:

> "Juveniles who commit crimes that reflect impetuosity, irresponsibility, inability to assess risks and consequences, vulnerability to peer pressure, substance abuse, or pathologies traceable to an unstable childhood cannot and should not escape punishment. And when the crime is 'a vicious murder,' it is 'beyond question' that a juvenile offender 'deserve[s] severe punishment.' [Citation.] Because [the two defendants] have been convicted of special circumstance murder, each will receive a life sentence. (§ 190.5(b).) The question is whether each can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults. [Citation.] Because the trial courts here decided that question without proper guidance on the sentencing discretion conferred by section 190.5(b) and the considerations that must inform the exercise of that discretion, we remand both cases for proceedings not inconsistent with this opinion." (*Gutierrez, supra,* 58 Cal.4th at pp. 1391–1392.)

Here, the trial court likewise decided Moses' sentence "without proper guidance on the sentencing discretion conferred" by section 190.5, subdivision (b). (*Gutierrez, supra,* 58 Cal.4th at p. 1391.) Accordingly, we will vacate Moses' sentence and remand to the trial court for consideration of whether Moses "can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter

society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults." (*Ibid*.)

VII. Proposition 57

A. Background

In this case, the district attorney directly filed charges against Nash and Moses in a court of criminal jurisdiction in 2010. (Welf. & Inst. Code, former § 707, subd. (d).) This procedure was authorized by California voters in March 2000 with the passage of Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, which "revised the juvenile court law to broaden the circumstances in which minors 14 years of age and older can be prosecuted in the criminal division of the superior court, rather than in juvenile court." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 549 (*Manduley*); accord, *Marquez, supra*, 11 Cal.App.5th at pp. 821–822, rev. granted.) However, on November 8, 2016, voters passed Proposition 57, the Public Safety and Rehabilitation Act of 2016, the purpose of which is to undo Proposition 21 with regard to juvenile offenders. (*Marquez, supra*, at p. 820.) Following the passage of Proposition 57, in relevant part, the district attorney is no longer authorized to directly file serious felony charges against juveniles in criminal court.[39] (*Marquez*, at pp. 820–821; Welf. & Inst.

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[39] As amended by Proposition 57, section 602 of the Welfare and Institutions Code now provides: "Except as provided in [Welfare and Institutions Code] Section 707, any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

Section 707, subdivision (a) of the Welfare and Institutions Code now provides: "(a)(1) In any case in which a minor is alleged to be a person described in [Welfare and Institutions Code] Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. The motion must be made prior to the attachment of jeopardy. Upon such motion, the juvenile court shall order the probation officer to submit a report on the behavioral patterns and social history of the minor. The report shall include any written or oral statement offered by the victim pursuant to [Welfare and Institutions Code] Section 656.2.

Code, § 707, subd. (a)(1).) Now, the district attorney may seek to transfer a case from juvenile court to criminal court, but allegations of criminal conduct against a person under the age of 18 must be initiated in juvenile court. (*Ibid*.) If the district attorney brings a transfer motion, it is for the trial court to determine whether the juvenile should be transferred to criminal court. (*Id.*, subd. (a)(2).)

The California Supreme Court directed us to consider whether Proposition 57 applies retroactively to juvenile offenders like Nash and Moses whose convictions were not yet final at the time of its passage. Nash and Moses argue the statute applies retroactively while the Attorney General argues it does not. We recently considered this issue in *Marquez* and concluded Proposition 57 is not retroactive. (*Marquez, supra,* 11 Cal.App.5th at p. 822, rev. granted; accord, *People v. Superior Court (Walker)* (2017) 12 Cal.App.5th 687, 690, 698 (*Walker*), rev. granted Sept. 13, 2017, S243072); *People v. Mendoza* (2017) 10 Cal.App.5th 327, 345, 348–349 (*Mendoza*), rev. granted July 12, 2017, S241647; *People v. Cervantes* (2017) 9 Cal.App.5th 569, 597–602 (*Cervantes*), rev. granted May 17, 2017, S241323; cf. *People v. Pineda* (2017) 14 Cal.App.5th 469, 482-483; *People v. Vela* (2017) 11 Cal.App.5th 68, 81, rev. granted July 12, 2017, S242298.) We also addressed and rejected the defendant's constitutional challenges to Proposition 57. (*Marquez*, *supra*, at pp. 824–825; accord, *Walker*, *supra*, at pp. 721–722; *Mendoza*, *supra*, at pp. 349–354; *Cervantes*, *supra*, at pp. 595, 598, fn. 38.) Our decision in *Marquez* considered most of the issues raised by Nash and Moses, as we explain, and we are unpersuaded to depart from its conclusions.

"(2) Following submission and consideration of the report, and of any other relevant evidence that the petitioner or the minor may wish to submit, the juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction. In making its decision, the court shall consider the criteria specified in subparagraphs (A) to (E). If the court orders a transfer of jurisdiction, the court shall recite the basis for its decision in an order entered upon the minutes. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the transfer hearing, and no plea that may have been entered already shall constitute evidence at the hearing."

B. Retroactivity

Turning first to retroactivity, embodied in section 3 is the general rule of construction that no part of the Penal Code is retroactive unless expressly declared. (*Marquez, supra*, 11 Cal.App.5th at p. 822, rev. granted.) "Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent." (*People v. Brown* (2012) 54 Cal.4th 314, 319.) When statutory intent is unclear, the default rule codified in section 3 controls. (*Ibid.*) The California Supreme Court has "described section 3, and its identical counterparts in other codes (e.g., Civ. Code, § 3; Code Civ. Proc., § 3), as codifying 'the time-honored principle … that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature … must have intended a retroactive application.' [Citations.] In applying this principle, we have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes. [Citations.] Consequently, '"a statute that is ambiguous with respect to retroactive application is construed … to be unambiguously prospective."'" (*Brown, supra*, at pp. 319–320.)

In *Marquez*, we concluded section 3's default rule applies to Proposition 57 "[b]ecause the statute contains no express declaration that sections 602 and 707 [of the Welfare and Institutions Code] apply retroactively to proceedings under the act, and there is no clearly implied intent of retroactivity in the legislative history …." (*Marquez, supra*, 11 Cal.App.5th at p. 822, rev. granted.) Further, neither the change in procedure pursuant to Proposition 21 nor the change in procedure pursuant to Proposition 57 affected the court's subject matter jurisdiction, and under either procedure, the superior court retained fundamental subject matter jurisdiction. (*Marquez*, at p. 823.)

We next considered and rejected application of the exception recognized in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), under which "courts ordinarily presume that newly enacted legislation lessening a criminal punishment is intended to apply 'to all

cases not yet reduced to final judgment on the statute's effective date.'"[40] (*People v. Conley* (2016) 63 Cal.4th 646, 655.) We found "*Estrada* does not control because Proposition 57's transfer of the fitness hearing procedure to juvenile court does not reduce punishment for a particular crime" (*Marquez, supra*, 11 Cal.App.5th at p. 826, rev. granted) and "'applying the *Estrada* rule to Proposition 57 would expand that rule in such a manner as to risk swallowing the general … section 3 presumption that legislation is intended to apply prospectively.'" (*Id.* at p. 827.)

We were also unpersuaded by the argument that Proposition 57 created an affirmative defense and the trial court acted in excess of its jurisdiction. (*Marquez, supra*, 11 Cal.App.5th at p. 828, rev. granted.) We explained, "This argument assumes Proposition 57 is retroactive. We have determined it is not." (*Ibid.*)

Thus, we reject Nash's and Moses' retroactivity arguments.

C. Constitutional Arguments

In *Marquez*, we also considered and rejected the argument that constitutional concerns necessitate relief. (*Marquez, supra*, 11 Cal.App.5th at pp. 829–830, rev. granted.) Here, Nash and Moses contend the failure to extend to them the benefit of a transfer hearing under Proposition 57 implicates equal protection, due process and Sixth Amendment concerns.

In *Manduley*, the California Supreme Court concluded Proposition 21 did not run afoul of due process or the Sixth Amendment. The court stated, "[P]etitioners do not possess any right to be subject to the jurisdiction of the juvenile court. As we have concluded, the legislative branch properly can delegate to the prosecutor—who

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[40]The California Supreme Court has described the rule articulated in *Estrada* as "an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively: When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown, supra*, 54 Cal.4th at p. 323, fn. omitted.)

traditionally has been entrusted with the charging decision—discretion whether to file charges against a minor directly in criminal court, and the Legislature also can eliminate a minor's statutory right to a judicial fitness hearing." (*Manduley*, *supra*, 27 Cal.4th at p. 567.) In light of these determinations in *Manduley*, we found the defendant's due process and Sixth Amendment challenges to Proposition 57 without merit in *Marquez*, observing we are bound by the decisions of our high court. (*Marquez*, *supra*, 11 Cal.App.5th at pp. 829–830, rev. granted; accord, *Mendoza*, *supra*, 10 Cal.App.5th at p. 353, rev. granted.)

As well, *Manduley* rejected an equal protection challenge to Proposition 21's statutory scheme. (*Manduley*, *supra*, 27 Cal.4th at p. 573.) The court concluded that given juveniles have no right to be subject to juvenile court law, they "cannot establish a violation of their right to the equal protection of the laws by showing that other minors in circumstances similar to those of petitioners can be prosecuted under the juvenile court law." (*Id.* at p. 570.) As stated in *Marquez*, we are bound by the decisions of our high court. (*Marquez*, *supra*, 11 Cal.App.5th at p. 829–830, rev. granted; accord, *Cervantes*, *supra*, 9 Cal.App.5th at p. 598, fn. 38, rev. granted.)

More recently, another Court of Appeal also found no equal protection violation. In *Walker*, the appellate court assumed for the purpose of the decision that the defendant was similarly situated to juveniles who committed crimes or had felony complaints filed against them after Proposition 57 was enacted. (*Walker*, *supra*, 12 Cal.App.5th at p. 721, rev. granted.) The court then concluded the defendant failed to establish the statute impinged on any fundamental rights and a rational basis for prospective application of Proposition 57 existed. (*Walker*, at p. 722; accord, *Mendoza*, *supra*, 10 Cal.App.5th at p. 351, rev. granted [applying rational basis test].) The court explained, "[A] rational voter could have concluded that a prospective application of the law would serve the legitimate goal of judicial economy by avoiding the invalidation of proceedings already conducted in Adult Court for those juvenile defendants against whom the People legally and

properly directly filed accusatory pleadings in Adult Court prior to the effective date of Proposition 57." (*Walker*, at p. 722; accord, *Mendoza*, *supra*, at pp. 351–352.)

On these grounds, we reject Nash's and Moses' constitutional challenges to Proposition 57.

D. Availability of Transfer Hearing on Remand for Resentencing

Finally, Moses argues that because we ordered his sentence vacated and the matter remanded for resentencing in light of *Gutierrez*, we should follow the procedures outlined in *Cervantes*, in which the appellate court held that on remand for retrial or resentencing, the defendant was entitled to a transfer hearing. (*Cervantes*, *supra*, 9 Cal.App.5th at pp. 613–614, rev. granted.) Nash also argues that, at a minimum, she is entitled to a transfer hearing on remand.

The *Cervantes* court reversed eight of the defendant's 15 convictions and remanded the matter for retrial. (*Cervantes*, *supra*, 9 Cal.App.5th at p. 621, rev. granted.) Although the court held Proposition 57 is not retroactive, it nevertheless concluded that because the defendant was subject to retrial on remand, Proposition 57 applied prospectively, entitling him to a transfer hearing under Welfare and Institutions Code section 707, subdivision (a)(1). (*Cervantes*, at pp. 607–609.) The court further found the defendant was entitled to a transfer hearing even if the prosecutor elected not to retry him and he was resentenced without retrial. (*Id.* at pp. 609–613.)

In *Marquez*, we recognized *Cervantes* held the defendant was entitled to a transfer hearing on remand but our defendant, in contrast, was not entitled to remand for either retrial or resentencing. (*Marquez*, *supra*, 11 Cal.App.5th at p. 828, rev. granted.) We concluded that because Proposition 57 does not apply retroactively, the defendant was not entitled to remand solely for a transfer hearing. (*Ibid.*)

In this case, Moses is entitled to resentencing on remand under *Gutierrez*, and Nash is entitled to a *Franklin* hearing. We are persuaded by the reasoning in *Walker*, however, and conclude that because Proposition 57 is not retroactive, it affords Nash and

Moses no entitlement to a transfer hearing on remand. (*Walker, supra,* 12 Cal.App.5th at pp. 713–723, rev. granted.) As explained in *Walker*,

> "[T]he procedure approved in *Cervantes* and [*People v. Superior Court (Lara)* (2017) 9 Cal.App.5th 753 (*Lara*), review granted May 17, 2017, S241231]—the transfer of a minor's case from Adult Court to Juvenile Court to permit the People to bring a motion to transfer the case back to Adult Court under the new law—does not constitute a proper *prospective* application of *Proposition 57*. Rather such a procedure is premised on the combination of an impermissible *retroactive* application of Proposition 57 to invalidate a properly direct filed case under the former law and the borrowed 'procedural framework' [citation] of a law *outside* of Proposition 57 to transfer the case from the Adult Court to the Juvenile Court. Because we see nothing in either Proposition 57 or California law that would justify or require such transfers, we decline to follow the *Cervantes* and *Lara* courts." (*Walker, supra,* 12 Cal.App.5th at p. 718, rev. granted.)

In reaching this conclusion, the court noted the reasoning underlying the determinations in *Cervantes* and *Lara* was "unmoored to any of the operative text of Proposition 57." (*Walker, supra,* 12 Cal.App.5th at p. 713, rev. granted.) It explained,

> "Neither the *Lara* court nor the *Cervantes* court cites to *any* language in the *operative text of Proposition 57* stating that a juvenile may no longer be *tried* in Adult Court without a transfer hearing. That is because there is no such language. As discussed above, Proposition 57 eliminated the People's ability to directly *file* charges against a juvenile defendant in Adult Court. [Citation.] If the text of Proposition 57 provided that a juvenile may no longer be *tried* in Adult Court, then we might agree with the *Lara* and *Cervantes* courts that, under *Tapia* [*v. Superior Court* (1991) 53 Cal.3d 282, 289], the change in the law would apply to cases not yet tried. [Citation.] However, absent such text, we cannot agree with the courts in *Lara* and *Cervantes* that Proposition 57 may properly be applied prospectively to cases filed in Adult Court prior to the effective date of the proposition." (*Id.* at p. 714, rev. granted.)

We agree with *Walker* and therefore decline Nash's and Moses' request to remand with instructions to conduct a transfer hearing in accordance with *Cervantes*.

VIII. Joinder

Nash and Moses join in and adopt the other's arguments pursuant to rules 8.200(a)(5) and 8.360(a). We conclude Nash's arguments do not benefit Moses and, likewise, Moses' arguments do not benefit Nash.

DISPOSITION

As to Nash, the special circumstance finding under section 190.2, subdivision (a)(17)(G) is reversed and the trial court is directed to prepare a new abstract of judgment. The judgment is otherwise affirmed but, in light of *Franklin*, *supra,* 63 Cal.4th at page 269, we remand the matter to the trial court for the limited purpose of determining whether Nash was afforded sufficient opportunity to make a record of information relevant to her eventual youth offender parole hearings and, if not, to afford her that opportunity. As to Moses, the matter is remanded to the trial court for resentencing in light of *Gutierrez*, *supra*, 58 Cal.4th 1354. In all other respects, Moses' judgment is affirmed.

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PEÑA, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

_____
BLACK,* J.

*Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.